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NOTES OF RECENT CASES.

[Full Bench.]

Govinda Menon, Basheer Ahmed Sayeed and Ramaswami, JJ — Subramania Chettiar *v.* Narayanan.

15th April, 1955. — A.A.A.O. No. 140 of 1951.

Limitation Act (IX of 1908), Article 182 (5)—'Final Order'—Execution petition validly presented into Court and returned for compliance with directions—Directions not complied with in time—Execution petition unnumbered and dismissed—If a 'Final Order' for purposes of saving limitation.

An execution petition which was in conformity with law was presented into Court and was returned by the office for certain amendments and it was eventually found that notwithstanding the return the requirements of Order 21, rules 11 to 14 of the Code have been complied with. The petition was re-presented after the expiry of the time granted for such re-presentation, with an application to excuse the delay and both the unnumbered execution petition and the application to excuse the delay were dismissed.

Held : Such dismissal of the execution petition would still amount to a 'Final Order' within the meaning of Article 182 (5) of the Limitation Act.

Held further : The correct and more acceptable view is not to treat the numbering and admitting of the execution petition as a necessary *sine qua non* for any order passed upon it to become final, if as a matter of fact the initial presentation complied with the provisions of the Code. The finality of the order does not depend upon the addition of the petition to the numbers of the execution petitions pending before the Court, but what has to be considered is the essence of the disposal. If after an order is passed it is not possible for the Court to do anything further with the paper that is rejected, then the order would be a final one ; but if something more has to be done even after the passing of the order in which case the Court will be enabled to take into consideration other matters arising out of the same petition, then it is difficult to say that it is a final order. The view that unless a petition is numbered it has no legal existance in the eye of the law is not correct.

(1942) 2 M.L.J. 768, overruled.

(1948) 1 M.L.J. 327 ; (1950) 2 M.L.J. 539 ; (1952) 2 M.L.J. 73 ; (1948) 2 M.L.J. 768, referred.

(1945) 1 M.L.J. 428 ; (1945) 2 M.L.J. 152 ; (1947) 1 M.L.J. 393 ; (1943) 1 M.L.J. 445 ; (1947) 2 M.L.J. 553, approved and followed.

(1939) 2 M.L.J. 671 ; (1941) 2 M.L.J. 1018 ; (1948) 2 M.L.J. 374, referred and dissented from.

V. Srinivasan and *T. R. Ramachandran* for Appellant.

Respondent not represented.

R.M. — *Appeal allowed.*

M—N R C

(FULL BENCH.)

Rajamannar, C.J., Rajagopalan and Rajagopala Ayyangar, JJ.
18th April, 1955.

Hajee Abdul Shukoor & Co. *v.* State of Madras.
T.R.C. No. 20 of 1954.

Madras General Sales Tax Act (IX *of* 1939)—*Turnover and Assessment Rules—Rules* 4 *and* 16—*Scope and function of—Tax on sale of hides and skins—Single point taxation—Scheme of.*

Though section 3 (1) of the Madras General Sales Tax Act levies a tax on the sale of goods on every dealer on his total turnover, in the cases of hides and skins this provision is subject to the terms of section 5 of the Act enacting a single point taxation in respect of certain specified sales. Section 3 of the Act would therefore be subject to the provisions of, among others, section 5 (*vi*) of the Act relating to hides and skins. The single point of taxation in a series of sales in such cases has to be fixed by the rules. Rule 4 (2) of the Turnover and Assessment Rules does not amount to the fixation of a single point within section 5 (*vi*) but is merely designed to determine whether it is the buyer or the seller that shall be liable to be taxed. The single point is fixed and the liability to tax is established only under rule 16. Under rule 16 (2) (*i*) it is only the sale of untanned hides and skins by a licensed dealer to a licensed tanner who tans the same that gives rise to a tax liability and hence purchases of untanned hides and skins by tanners from persons other than licensed dealers are not within the taxing provision.

(1952) 2 M.L.J. 598 at page 612 held *obiter.*

(1954) 2 M.L.J. 668 observations approved.

In computing the purchase turnover of a licensed tanner only the sales to him from licensed dealers should be included.

Quaere : Whether a licensed tanner, who purchases untanned hides and skins from an unlicensed dealer is liable to be taxed on his turnover under rule 16 (2) or under any other provision of the Act and rules framed thereunder ?

T. T. Srinivasan and *A. N. Rangaswami* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Assistant Government Pleader (*K. Veeraswami*) for Respondent.

R.M. ——— *Reference answered accordingly.*

Rajagopalan and Rajagopala Ayyangar, JJ.
18th April, 1955.

Hari Ram Sait *v.* Commissioner of Income-tax, Madras.
R.C. No. 26 of 1952.

Indian Income-tax Act (*XI of* 1922), *section* 28 (1) (*c*)—*Penalty under—When could be levied.*

In order to levy a penalty under section 28 (1) (*c*) of the Income-tax Act, what has to be proved is that the person who has to be penalised has concealed particulars of his income. The concealment must be of the assessee's income and the assessee should be conscious of it.

The fact that the father of the assessee (a minor) was guilty of concealment or suppression of income in the previous accounting year could not be a ground to penalise the assessee after the death of the father.

S. Swaminathan for Applicant.

C. S. Rama Rao Sahib for Respondent.

R.M. ——— *Answer in favour of the assessee.*

Rajagopalan. J.
21st April, 1955.

Jayalakshmi Ammal *v.* State of Madras.
W.P. No. 794 of 1953.

Madras District Municipalities Act (*V of* 1920)—*Section* 252 *read with sections* 250 *and* 251—*Powers of State Government under—Licence granted by Municipality—Extent of the power of Government to cancel—Powers of Municipality and Government are to be governed by same principles.*

The jurisdiction of the State Government to act under section 252 of the District Municipalities Act is controlled by the provisions of section 250 or section 251 of the said Act. The limits oft he jurisdiction of the Municipality to refuse to grant a licence are set out in section 250 (3) of the Act. The power of the Government under section 252 of the Act to cancel a licence has also to be governed by the same limits as are placed on the powers of the Municipality under section 250 (3) of the Act.

Where a licence has been granted by the Municipality after due consideration of the provisions of section 250 of the Act, the Municipality can only act thereafter under section 251 of the Act by imposing restrictions on the use of the machinery, etc. The State Government also, acting under section 252 could impose only those restrictions as provided under section 251 if the Municipality has omitted to do so. The State Government cannot purport to act under section 250 of the Act and cancel a license duly and validly granted by the Municipality. In such cases the Municipality or the Government could only exercise the powers under section 251 of the Act and they could only take steps to abate any nuisance and cannot cancel the license acting under section 252.

The scheme of section 250 and section 251 of the Act makes a distinction between the stage before the installation of the machinery and the stage after installation, restricting the powers of the Municipality at each stage. The State Government's powers to act under section 252 must be read with section 250 or section 251 as the case may be.

M. S. Venkatarama Aiyar for Appellant.

The Special Government Pleader (*V. V. Raghavan*), *T. Muniswami Reddi*, *R. S. Venkatachari* and *S. Ramachandra Ajyar* for Respondents.

R.M. —————— *Rule made absolute.*

Rajagopala Ayyar, J.,
21st April, 1955.

Balasubramania Pillai *v.* Govindarajulu Naidu.
C.R.P. No. 1420 of 1954.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 12-B—*Revisional powers of District Court under—Scope and extent of.*

The only proper way of defining the relative jurisdiction of the appellate and revisional authorities constituted under the Madras Buildings (Lease and Rent Control) Act is to hold that while an appellate authority is entitled to examine every question of fact and law dealt with in or arising out of an order of the Rent Controller, a revisional authority, while undoubtedly it can interfere with questions of law where the Rent Control Act or any provision has been misconstrued, cannot normally interfere with findings of fact unless (*a*) there was no other materials on which such a finding could be based or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter or (*c*) it is so perverse that no reasonable person could have reached that conclusion or (*d*) the finding has been reached by an erroneous understanding of the law applicable to the matter. To hold that a revisional authority could interfere with findings of fact of an appellate authority without regard to these limitations would be to convert a revision into a regular appeal and to obliterate the distinction between appeals and revisions which the Act has taken care to provide.

A. V. Narayanaswami Ayyar and *R. Venkatachalam* for Petitioner.

K. S. Desikan and *K. Raman* for Respondent.

R.M. —————— *Petition allowed.*

Rajamannar C.J., and Somasundaram, J.,
22nd April, 1955.

Gopalan Nambiar *v.* Krishnan Nambiar.
C.R.P. No. 1870 of 1952.

Code of Civil Procedure (V of 1908), *section* 48—*Applicability to execution of decrees of Village Courts.*

There is no provision in the Village Courts Act making the Code of Civil Procedure or any part of it applicable to proceedings under the Village Courts Act.

It follows therefore that section 48 of the Code as such does not apply to the execution of a Village Court decree. The Village Courts Act provides for execution of a village Court decree by two classes of Courts, namely a Village Court itself and the Court of the District Munsiff to which it is transmitted or to which it is withdrawn.

A decree of a Village Court is a decree of a Civil Court, though no doubt that of a special Court with limited powers. There are provisions in the Village Courts Act for execution of the decrees passed by a Village Court by that Court itself.

[Difference between a decree of such a Court and an award of a Registrar under the Co-operative Societies Act or an order under the Religious Endowments Act which are not capable of execution by themselves but only by a transferee Court pointed out]. When a decree passed by one Court is transferred to another Court for execution the law of limitation applicable to a petition for execution is the law applicable to a decree of the Court which passed the decree and not the law applicable to a decree passed by the transferee Court. The fact that the Court to which the decree has been transferred is a Court, the decree of which will be governed by section 48 of the Code of Civil Procedure, would not make any difference.

The fact that a decree of a Village Court is transferred to a District Munsiff's Court for execution would not have the effect of making section 48 of the Code of Civil Procedure applicable to the execution petition. The Indian Limitation Act applies to proceedings in a Village Court. The Law of Limitation applicable to Village Court decrees is governed by that Act alone.

I.L.R. 36 Mad. 108 : 21 ML.J. 777 ; (1950) 1 M.L.J. 437 ; I.L.R. 17 Cal. 491; A.I.R. 1942 Pat. 128, referred.

(1939) I M.L.J. 695 ; (1940) I M.L.J. 268, explained.

I.L.R. 56 Mad. 712 : 65 M.L.J. 364 ; I.L.R. 58 Mad. 760 : 68 M.L.J 200, dist.

V. P. Gopalan Nambiar for Petitioner.

A. Achuthan Nambiar for Respondent.

R.M. — *Petition dismissed.*

Rajamannar, C.J., and Somasundaram, J.,
22nd April, 1955.

Muthappa Chettiar *v.*
Salem Rajendra Mills, Ltd.
Appeal No. 296 of 1950.

Company Law—Refusal of a company to register the transfer of shares in the name of the transferee —When justified—Discretion of the directors—If could be interfered with by Court—Reasons for the refusal—If should be given.

If a discretion as to registering transfers of shares of a Company is given by the Articles of Association of the Company to the Directors, a Court will not control the exercise of such discretion unless it is proved that the Directors are not exercising the discretion *bona fide* or are acting in other ways oppressively, capriciously or corruptly or in some way *mala fide.*

Palmer's Company Law 19th Edn., p. 109; In re *Gresham Life Assurance Society,* L.R. 8 (Ch. App.) 446 ; Buckley's Companies Act, 22nd Edn., p. 175 referred.

A Court will not draw an unfavourable inference against the Directors because they did not give their reasons for refusing to pass a particular transfer ; for they are under no obligation to disclose their reasons either in Court or out of Court. It is enough that they in fact fairly considered the question of transfer but that in exercise of the discretion given to them by the Articles they have not passed it.

In re *Coal Port China Company,* (1895) 2 Ch. D. 404 at 407, referred.

But if the Directors do give their reasons the Court must consider whether they are legitimate or not (*i.e.*) with a view to find out whether the Directors acted on right or wrong principles.

In re *Bell Brothers, Ltd.,* 7 T.L.R. 446.

If a person who applies for transfer of shares in his name is of such a character as to throw the company into confusion (*e.g.,*) by indulging in unnecessary

litigation and if he is not a desirable one, the Board of Directors would certainly be acting in the best interests of the company in refusing to register the share in his name and such a reason is quite a valid one.

R. Gopalaswami Ayyangar and *R. Sundaralingam* for Appellant.

S. Thyagarajan, K. Subramaniam and *Alladi Kuppuswami* for Respondent.

R.M. ——— *Orders accordingly*.

Krishnaswamy Nayudu, J. Mohideen Batcha Rowther *v.*
28th April, 1955. Sulaiman Sahib.
C.R.P. No. 2523 of 1952.

Code of Civil Procedure (V of 1908), *section* 51 (*d*), *Order* 21, *rule* 11 (i) (iv) *and Order* 40, *rule* 1—*Appointment of Receiver in execution of decree under Order* 21—*If appealable as an order under Order* 40.

The substantive provision of law empowering a Court to order execution of a decree is section 51 of the Civil Procedure Code which provides that subject to such conditions and limitations as may be prescribed, a Court may, on the application of the decree holder order execution of a decree by the several modes including the appointment of a Receiver. Thus the power of Court to appoint a Receiver in execution is derived from section 51 of the Code of Civil Procedure. In an execution application under Order 21 of the Code one of the modes in which the assistance of Court can be asked for is by appointment of a Receiver. But the procedure to be adopted in such an appointment not being provided for in Order 21 relating to execution, the provisions of Order 40, rule 1 of the Code have to be applied by the Court, if it decides to appoint a Receiver in execution.

Hence in appointing a receiver in execution, the executing Court has necessarily to rely on Order 40, rule 1, Civil Procedure Code and could make such an appointment only under the conditions and limitations specified therein. Though the order is primarily in execution under section 51 (*d*) of the Code, it is in substance and reality one made under Order 40, rule 1 and third parties who are affected by such an order need not resort to a suit but could appeal against such an order under Order 42, rule 1 (*s*). The test will be whether a stranger who objects to the order is a person that could be said to be one against whom such an order is made or is otherwise affected by such order and if it is shown that he is a person affected by the order, the order should necessarily be considered to be one under Order 40, rule 1 and therefore appealable.

A.I.R. 1927 Lah. 190; 48 I.C. 133; 78 I.C. 1931; 36 Cal. 713; 59 Cal. 205; (1928) M.W.N. 390; A.I.R. 1929 Mad. 20, referred.

M. R. Narayanaswami and *K. Thirumalai* for Petitioner.

K. Rajah Ayyar, N. R. Govindachari and *S. K. Ahmed Meeran* for Respondent.

R.M. ——— *Petition dismissed*.

Mack, J. Arunachala Naicker *v.* Gopal Stores.
28th April, 1955. C.R.P. No. 32 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (c) *and proviso*—*Landlord requiring additional accommodation*—*If could be maintained in respect of a different building*—*Two buildings situated contiguously*—*If one could be asked as an additional accommodation of another*—*Equities to decide balance of convenience*—*Availability of alternative accommodation*—*If could be taken in consideration.*

The proviso to section 7 (3) is of particular application to cases coming under section 7 (3) (*c*) which applies only to landlords occupying only a part of a building seeking to evict a tenant occupying the whole or other parts of the same building, if he requires additional accommodation. Part of a building also comes within the scope of the definition of the word 'building' under section 2 (1) of the Act and it is in the light of this definition that section 7 (3) (*c*) of the Act has to be interpreted.

A landlord doing business in one building purchasing a building next to his cannot seek to evict the tenant of that building under section 7 (3) (*c*). The mere fact that two buildings let separately, and as such constituting separate buildings under

the Act, are comprised in one structural building does not make any difference. It is sufficient for the purpose of excluding the operation of section 7 (3) (*c*) of the Act if the petitioner and respondent were in occupation of separate buildings as defined in the Act.

Equitable protection is afforded to long standing tenants under the Proviso to section 7 (3). In the Madras Buildings (Lease and Rent Control) Act, there is no reference to availability of alternative accommodation as under the English Act. But this is undoubtedly a circumstance to be taken into consideration in applying the equitable proviso, which gives the Court very wide discretion to reject an application for eviction, if it is satisfied that the hardship which may be caused to the tenant will outweigh the advantage to the landlord. In case of conflict of equities a Court has to resolve it by considering the balance of equity in the light of the proviso.

V. Srinivasa Ayyar and *K. Raman* for Petitioner.

W. S. Venkataramanjulu for Respondent.

R.M. — *Petition allowed.*

Rajamannar, C.J., and Somasundaram, J.
2nd May, 1955.

Kumaraswami Pillai *v.* Venkataramana Rao.
W.A. No. 146 of 1954.

Elections—Municipal elections—Power of Election Commissioner to order amendment of an election petition by adding an additional ground after the time for presenting an election petition has lapsed.

Madras District Municipalities Act (*V of* 1920)*—Rule for decision of Election disputes—Rule* 6*—Applicability of the Code of Civil Procedure to proceedings under—Amendment of election petitiod—Applicability of Order* 6, *rule* 17, *Civil Procedure Code.*

The general rule is well settled that the statutory requirements of election law must be strictly observed and an election contest is not an action at law or a suit in equity but is purely a statutory proceeding unknown to the common law and the Court possesses no common law power. Any petition seeking to set aside an election must strictly conform to the requirements of the law.

An election tribunal has no power to permit new charges to be introduced by way of amendment to an election petition after the expiry of the period within which alone an election petition could be filed.

(1954) S.C.J. 257 : (1954) S.C.J. 695, referred.

Quaere :—Whether the provisions of Order 6, rule 17, Civil Procedure Code apply to the procedings before an Election Tribunal ?

W.A. No. 49 of 1953 ; (1953) 2 M.L.J. 30 (N.R.C.) ; I.L.R. (1953) Bom. 865 ; A.I.R. 1954 Mys. 102 ; A.I.R. 1955 Pat. 81, referred.

Assuming that Order 6, rule 17, Civil Procedure Code, would apply to the trial of an election petition by an Election Tribunal, the power to amend an election petition does not extend to allowing an amendment by which a totally new charge is sought to be added to the charges already made in the election petition when filed, after the time for filing the election petition has expired. The rule of English Law which is based on equity and justice should be taken into account. The plain language of Order 6, rule 17, of the Code of Civil Procedure does not also permit a new charge to be added by way of an amendment.

Merely because the Election Commissioner ordered some costs to be paid in the order of amendment and that costs was drawn out by the party opposing the amendment it does not operate as a bar to the maintainability of an application under Article 226 of the Constitution.

A.I.R. 1933 Mad. 410, distinguished.

S. Mohan Kumaramangalam and *V. Meenakshisundaram* for Appellant.

T.R. Ramachandran and the Special Government Pleader (*V.V. Raghavan*) for Respondents.

R.M. — *Appeal dismissed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
29th April, 1955.

Thangavelu Mudaliar *v.* Thirumalswami Mudaliar.
A.A.O. No. 726 of 1952.

Transfer of Property Act (*IV of* 1882), *section* 100—*Charge—Scope of—Charge created by a decree of Court—If within the scope of section* 100—*Extinguishment of charge—Property charged with several debts—Sale in execution of one debt—If extinguishes the other charges.*

A single charge, as distinct from a simultaneous charge in favour of more than one party for different amounts, stands on a different footing. A single charge, over property in favour of a creditor can become extinguished if the property is sold in execution of the decree creating the charge, but the same cannot be said to be the result when one of two simultaneous charges is enforced and the property is sold in the course of such enforcement.

(Analogy of property charged with payments of maintenance—sale for arrears of maintenance does not extinguish the charge for future maintenance pointed out). When there are more charges than one in respect of the same property if it is sold in the enforcement of one charge, it cannot amount to the extinguishment of the other charge which has not been enforced.

Even on a consideration of the language of section 100 of the Transfer of Property Act itself it seems to be reasonable to hold that the section does not include within the scope of the phrase 'by operation of law' what is brought into existence by reason of orders or decrees of Court. The distinction furnished between transfer by operation of law and that by or in execution of a decree by a competent Court would afford sufficient indication of the intention of the legislature that the charge created by operation of law must be understood to be distinct and different from a charge created by a decree of Court and the former cannot include the latter. A charge created by a decree of Court cannot be a charge created by act of parties or by operation of law. It is altogether a different category not contemplated by section 100, Transfer of Property Act. The scope of section 100 is limited only to charges created by Act of parties or by operation of law.

A.I.R. 1939 All. 579 ; A.I.R. 1940 Nag. 163 ; A.I.R. 1945 Pat. 278 ; A.I.R. 1948 Pat. 199 followed.

A.I.R. 1944 Nag. 1 ; A.I.R. 1941 Pat. 95 ; (1945) 2 M.L.J. 388 differed.

V. C. Srikumar and *P. S. Varadan* for Appellant.

S. Ramachandra Aiyar for Respondent.

R.M. *Order set aside and case remanded.*

Rajamannar, C.J., and Somasundaram, J.
29th April, 1955.

John *v.* Vasantha Pai.
W.A. Nos. 25 & 26 of 1955.

Representation of the People Act (*XLII of* 1951), *sections* 81, 84, 98, 100 *and* 101—*Cumulative effect of—Election Petitioner—If could pray for more than one relief—Conduct of Election and Election Petition Rules—Rule* 119.

Section 81 of the Representation of the People Act provides that an election petition calling in question any election under the Act may be presented on one or more of the grounds specified in sub-sections (1) and (2) of section 100 and section 101 of the Act. Sub-section (1) of section 100 relates to relief (*c*), sub-section (2) to relief (*a*) and section 101 to relief (*b*) in section 84 of the Act. Section 81 permits an election petition on one or more of the grounds specified in these several provisions. There is nothing to prevent an election petitioner from alleging in the same petition grounds some of which would fall within sub-section (1) and others under sub-section (2) of section 100. It follows that an election petitioner may pray for more than one relief. But it is clear that the Tribunal can actually grant only one of the three reliefs or dismiss the entire petition under section 98 of the Act. The language,

namely " a petitioner may claim any one of the following declarations " in section 84 of the Act is not inconsistent with a petitioner claiming any one of the three alternatively.

A.I.R. 1954 All. 245 ; A.I.R. 1954 Nag. 26 ; (1954) S.C.J. 723 referred.

The two clauses of rule 119 of the Election Petition Rules, 1951, must be taken to provide for any election petition that may be presented, whatever the relief or reliefs prayed for might be. Clause (*a*) would apply to every petition, in so far as it is directed against a returned candidate. If there is only one returned candidate clause (*a*) will apply whether the relief prayed for is that his election should be set aside or the election should as a whole be set aside because the result comes to the same thing, though the grounds may be different. When there are more returned candidates than one, an election petition may pray for a declaration that the election of any one of them to be void. Even then, clause (*a*) would apply. It would equally apply when the election of more than one candidate is impugned individually. In such a case, though an election petition may comprise reliefs directed against several candidates, for the purpose of limitation such a petition should be deemed to comprise several petitions, each directed against one of the candidates returned, and time must be calculated under clause (*a*) of the rule with reference to each of them.

Clause (*b*) of Rule 119 would apply only to a case where there are more returned candidates than one and the election petitioner prays that the election should be declared to be wholly void. The words " calls in question the election as a whole " in the rule must be construed with reference to the provisions of section 84 (*c*) and section 100 (1). The expression " as a whole " in the rule should be understood in the context with reference to the specific relief which is allowed to be claimed, namely, a declaration that the election is wholly void.

M. K. Nambiar, T. Ramaprasada Rao, N. Srivatsamani and *V. P. Raman* for Appellants.

K. Venkatasubramania Aiyar, T. Krishna Rao and *A. Narayana Pai* for Respondents.

R.M. *Appeals dismissed—Directions given.*

Somasundaram, J. Public Prosecutor *v.* Alangaram Chettiar.
29th April, 1955. Crl. Appeal No. 780 of 1954.

Madras District Municipalities Act (V of 1920), *sections* 244 *and* 249—*Coffee-hotel on Railway premises with the permission of the Railway Authorities—Necessity to obtain a licence under the Municipalities Act.*

Under section 249 of the District Municipalities Act for the purpose of running a coffee-hotel in any place within the limits of a Municipality the licence of the executive authority of that Municipality is undoubtedly necessary. According to section 244 of the Act the licence prescribed under section 249 of the Act is not necessary if the Central or State Government or any Committee appointed under the Marketing of Commercial Crops Act does anything in a place in their occupation or under their control, for which a licence is otherwise required as per the Schedule of the Act. But if a private person does coffee-hotel business in the place under the occupation or control of the Central or State Government he has to take out a licence and pay the prescribed fee as required by the Act and section 244 of the Act does not confer any exemption in such cases. Sections 244 and 249 of the Act have to be read and interpreted only in this way.

Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

S. Krishnamurthi for Respondent.

R.M. *Appeal allowed.*

Rajamannar C.J. and Somasundaram, J. University Registrar *v.* Sundara Shetty.
2nd May, 1955. W.A. Nos. 27, 28 & 29 of 1955.

Evidence Act (I of 1872), *section* 115—*Equitable estoppel—Doctrine of—University of Madras Regulations—Eligibility of a candidate for the University course of studies and to appear for the University examination—Wrong endorsement of eligibility by the Secretary, Secondary Education Board on behalf of the University—University, when estopped from questioning the validity or correctness of the endorsement of eligibility—Doctrine of equitable estoppel—Applicability.*

Under the Ordinances and Rules of the University of Madras, a student is eligible for admission into the University course of studies only if he is declared eligible (on the basis of marks obtained) by the inclusion of his name in the list of such candidates published in the *Fort St. George Gazette* which is the authoritative list. But due to the exigencies of the situation such as time and convenience, the practice of affixing a stamp of eligibility to the Secondary School Leaving Certificate Book of the candidates was adopted. On the basis and strength of such an eligibility stamp a candidate sought and obtained admission to the University course of studies and had undergone the course to a great extent. A few months prior to the termination of the course and before the University examination it was discovered that the candidate had not been declared eligible to the University course of studies and that he had embarked on the studies on the basis of the wrong stamp of eligibility in his Secondary School Leaving Certificate Book by the Board of Secondary Education.

Held, that though the list of eligibility as published in the *Fort St. George Gazette* may be the only valid list as per the Rules and Ordinances of the University and the endorsement of eligibility on the Secondary School Leaving Certificate Book may not be strictly authorised by the rules, still the list published in the Gazette itself is not conclusive but is subject to corrections and it cannot therefore be held to be the only proof of eligibility.

Held further, that the candidate having expended time and money in pursuing a course of study on the strength of the endorsement, even though wrong, made by the Secretary, Secondary Education Board, acting presumably on behalf of the University, it is a case of legal or equitable estoppel which satisfies practically all the conditions embodied in section 115 of the Evidence Act and the University of Madras was estopped from saying that the candidate could not continue his studies.

(Cases of fraud or *mala fide* might stand on different footing. In cases such as these the question of 'giving an opportunity to the candidate to explain' is not very material and the conduct of the University is not in any way *mala fide.*)

K.V. Venkatasubramania Ayyar and *C.N.S. Chengalvarayan* for Appellant.

The Special Government Pleader (*V.V. Raghvan*), *S. Mohan Kumaramangalam, S. Gopalaratnam, K.V. Sankaran, M.K. Nambiar, V. Meenakshisundaram and A. Shanmugavel* for Respondents.

R.M. *Appeals dismissed.*

Rajagopalan and Rajagopala Ayyangar, JJ. Sadasivan *v.* C.I.T., Madras.
6th May, 1955. R.C. No. 16 of 1952.

Income-tax Act (XI of 1922), *section* 10—*Capital and revenue receipts—Nature of—Consideration received for the surrender of right to future profits of the exploitation of a film—If capital receipt.*

Where two parties produced a talkie film jointly but not in partnership, and one of them receives a lump sum amount from the other, which included the remu-

neration for past services and the right to future profits the amounts so received is not wholly a revenue receipt. A distinction should be made between payments made for past services or in discharge of past liabilities. Such payments are wholly in the nature of revenue receipts and its nature is not changed merely because they also form part of a transaction by which future rights also in the capital asset are released and a single consideration is received for the two sets of items. But where one gets a payment for the surrender of the rights to a share of the future profits and income of film, which is the capital asset, that sum is a sum received by way of capital and not an income receipt. In giving up one's rights for years ahead and receiving one sum down aggregate of profits which one would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But it is not necessarily in itself an item of income. Money laid out to secure or money received for the cancellation or surrender of so fundamental a right as the future rights in a capital asset, cannot be regarded as an income disbursement or income receipt. The money received for such surrender of the congeries of rights which one enjoyed, is a capital asset. It is the surrender of the share in the asset.

Van Den Berghs Ltd., v. *Clark*, 19 Tax Cases 390 (H.L.) and *Barr, Crombie & Company Ltd.*, v. *Commissioners of Inland Revenue* (1947) 15 I.T.R. 56 (Sup.) Ref.

In such cases where the consideration received consists of both revenue receipts and capital assets, there should be an apportionment between the sum attributable to either. *Carter* v. *Wadman*, 28 Tax Cases 41 referred.

Where a lump sum payment is made in respect of two different matters, one of which would lead to an assessment for tax and the other would not, the Commissioners have to apportion the same.

T. V. Balakrishnan for Applicant.

C. S. Rama Rao Saheb for Respondent.

R.M. *Answered accordingly and directions given.*

Krishnaswamy Nayudu, J. Logambal Ammal, *In the Petition of.*
10th May, 1955. S.R. No. 3489 of 1955 (O.S.A.)

Court-fees—Leave to sue in forma pauperis *refused by the Master—Appeal to the Judge in Chambers dismissed—Original Side Appeal—Court-fee payable—High Court Fees Rules, Item* 45 (1)—*Applicability.*

An order by the Master refusing to grant leave to sue *in forma pauperis* to an applicant is one under Order 33 of the Code of Civil Procedure and is as such appealable under Order 43, rule (1) (*nn*) of the Code. An appeal to the Judge in Chambers from an order of the Master, though in the form of a Judge's summons as required by the Original Side Rules is an appeal under the said provision of the Code of Civil Procedure and the character of the proceedings before the Judge is not changed. An appeal from an order passed by the Judge in Chambers, on appeal from the order of the Master, is an appeal under clause 15 of the Letters Patent and Item 45 (1) of the High Court Fees Rules would not apply to such an appeal and the proper court-fee payable is that provided under item 45 (2), because a Judge of the High Court sitting in Chambers is not subordinate to the High Court, notwithstanding that an appeal is provided against the order or judgment of a single Judge of the High Court to a Bench of the same High Court.

G. Radhakrishnan for Petitioner.

G. Ramanujan for Government Pleader (*C. A. Vaidialingam*) for Respondent.

R.M. *Directions accordingly.*

Mack and Krishnaswami Nayudu, JJ. Kulittalai Bank *v.* Nagamanickkam.
4th March, 1955. Appeal No. 902 of 1950.

Hindu Law—Joint family—Debts—Business debts—Binding nature—Trading family whose hereditary vocation or kulachara *is trade or commerce—Powers of manager to start new trade—Scope and extent of.*

Per *Mack, J.*—" A managing member of a Hindu joint family, whether he is the father or a senior coparcener cannot start a new trade or business so as to impose upon the minor members the risk of such business. This limitation on the powers of a manager does not apply to the manager of a trading family or one whose *kulachara* or hereditary vocation is trade. In the case of such a family the borrowings of the father for purposes of the family business he entered upon for the benefit of his family need not be justified on the ground of legal necessity or benefit. The family can extend its enterprise from a shop business into a rice business, which to an extent is of a different kind. Risk or loss is inevitable and expected and except in cases where the business can be shown to be imprudent or rash, in the case of a business family the debts contracted by the father for the business will be binding on the sons."

Per *Krishnaswami Nayudu, J.*—" Even as regards a hereditary trading family the manager of a joint Hindu family has no authority to impose upon a minor member the risk and liability of a new business started by him and it will not make any difference whether the manager is also the father or not." The mere fact that a new business is started by a trading family which may not be the very same identical ancestral business, would not by itself be a sufficient defence to the minor sons to resist any proceedings against their interests in the family properties for debts incurred by their father in such a business. Even in such a case, it may not be open to the father or manager to start a new business which would be attended with risk and not akin to or of the nature carried on by his ancestors. The trade or business carried on need not be the identical one. It will be a question of fact in every case whether even in a trading family a new business started is one which is akin to or of the nature carried on by the family or is one attendant with risk and should not therefore have been started, which might result in detriment to the interests of the minor. An extension of the old business may not be considered to be a new business, but a new business started must be shown to be a business which is not one that would ordinarily lead the members of the family to great risk.

(Case-law reviewed—Rationale of the law discussed).

A. V. Narayanaswami Aiyar and *R. Venkatachalam* for Appellant.

T. A. Anantha Aiyar for Respondent.

R.M. *Appeal allowed.*

Ramaswami, J. Rangayyan *v.* Innesimuthu Mudali.
28th March, 1955. S.A. No. 741 of 1954.

Evidence Act (*I of* 1872), *sections* 11, 13, 32 (3) *and* 157—*Recitals of boundaries in documents* inter partes *and between party and strangers and between strangers—Admissibility and probative value.*

The recital of boundaries of a property in a document *inter partes* is a joint statement made by the parties to the document and therefore relevant against all of them as an admission. Where such recital is in a document between a party and a stranger it is relevant against the party as an admission but is not admissible in his favour. But where such recital is in a document between strangers it is not ordinarily admissible to prove possession or title as against a person who is not a party to the document except in cases falling under sections 11, 13, 32 (3) or 157 of the Evidence Act, the particular circumstances of the case determining the particular section applicable. The probative value to be attached will also equally depend upon the circumstances of each case and may vary from nothing to almost clinching evidence.

M—N R C

A.I.R. 1940 Mad. 450 and (1947) 1 M.L.J. 60 followed.

A.I.R. 1928 Mad. 105 differed.

Case-law reviewed.

G. R. Jagadisan, A. R. Ramanathan and *C. Ramanathan* for Appellant.

K. Narayanaswamy Mudaliar and *T. Sundaram* for Respondent.

R.M. ——— *Appeal allowed—No leave.*

Rajagopalan and Rajagopala Ayyangar, JJ. Gandhi Sons, Ltd. *v.* State of Madras.
5th April, 1955. T.R.C. No. 11 of 1954.

Madras General Sales Tax Act (IX of 1939) *and Article* 286 (1) *of the Constitution of India—Section* 2 (*h*) *Explanation* (2)*—Sale—Locus of—How determined—' Export sale ' and ' sale in the course of export '—Meaning of—C.I.F. contracts—When exempt from levy of sales tax.*

In order to find out whether a particular sale is exempt from the levy of sales tax under the Madras General Sales Tax Act as a result of Article 286 (1) of the Constitution, the locus of the sale for the purpose of tax liability is to be determined as per Explanation (2) to section 2 (*h*) of the Act, except to the extent such sales are taken out of the purview of the tax liability by the Constitution.

An ' export sale ' which gets immunity from sales tax under Article 286 (1) of the Constitution is one in which the assessee figures as exporter—privity having been established between him and the foreign buyer, either through direct negotiation or delivery or through the local representatives of the latter. In order to determine whether a particular sale is one ' in the course of export ' within the the meaning of Article 286 (1) (*b*) of the Constitution the crucial question to be considered is whether the sellers continued to be the owners of the goods up to or beyond the time when the goods, so to speak, entered the export stream. In a C.I.F. contract where the goods are consigned in the name of the buyers two views are possible as to the inference to be drawn. One is that the seller reserves the *jus disponendi* in himself till the documents are presented to the buyer and the payment is made. (Section 25 (3) of the Sale of Goods Act). The other is that the property passes immediately and the sellers retain possession of the bills only for the purpose of claiming a lien on the goods to secure payment of the price, he having parted with the property in them. The first of the two alternatives will be the normal rule because the taking a bill of lading in the name of a buyer does not *ipso jure* negative a conditional appropriation or the reservation of a right of disposal.

(Case-law discussed).

The fact that the invoice showed that the goods were loaded on account and at the risk of the buyer refers to the situation after the shipping and may even negative the passing of the property at any earlier stage.

M. K. Nambiar, C. F. Louis and *G. K. Govinda Bhat* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

R.M. ——— *Assessment varied—Petition allowed.*

Rajamannar, C.J. and Rajagopala Ayyangar, J. Sivaramakrishnan *v.* Kaveri Ammal.
7th April, 1955. Appeals Nos. 217 of 1950 & 151 of 1951.

Hindu Law—Joint family—Property acquired by sole coparcener in partition—When could become ancestral joint family property—Property acquired out of income of joint family property in the hands of a sole coparcener—If joint family property—Theories of accession, accretion amd detriment to the estate—Scope of—Detriment to the estate—Loan raised on ancestral property and subsequently discharged—If detriment.

Property obtained by a coparcener on partition is not always ancestral joint family property in which sons born or adopted subsequently have rights, notwith-

standing that, at the date of the partition, the dividing member was a sole coparcener. A sole coparcener has absolute rights of alienating properties thus obtained by him on partition and subsequently born or adopted sons cannot question such alienations for the property has ceased to be family property at the date of their birth or adoption.

Where ancestral property is sold by a coparcener and the sale proceeds are utilised for the acquisition of other property, either with or without self-acquired funds, the property so acquired would partake of the character of ancestral property in which sons subsequently born or adopted would acquire coparcenery rights because such property has been acquired " by detriment to the paternal estate ", the detriment being that the original property, which would have come to him but for the alienation, is not available at the subsequent date. Apart from cases of such detriment, where from the income of ancestral property a sole copar ener makes purchases the only legal basis for imputing joint family character to the subsequent acquisitions is the theory of accretion which would be dependent upon the intention of the acquirer. In such cases the mere utilisation of any portion of the income from ancestral property would not *ipso jure* render the acquisition part of the ancestral property in which a son subsequently born or adopted would acquire a right by birth. The income received by a sole coparcener from what might become joint family property on the emergence of a coparcener is till such date at the absolute disposal of such owner.

Where on the security of ancestral property money is received for business by a coparcener and out of the profits of such business done acquisitions are made and the debts on the ancestral estate are discharged before the birth or adoption of a son, there could be no ' detriment to the parental estate ' since the debts have been discharged before the son's birth and the ancestral property was available to him when he was born. There is no detriment to the interests of any coparcener, nor can the subsequent acquisitions be treated as coparcenery property by recourse to the theory of accession or accretion in the absence of evidence of such intention.

I.L.R. 28 All. 347 approved.

I.L.R. 11 Mad. 24 disapproved.

I.L.R. 25 Mad. 351 and I.L.R. 8 Cal. 131 Referred.

I.L.R. 10 Bom. 528, 13 M.I.A. 542 and A.I.R. 1940 Bom. 200 explained.

16 L.W. 936, observations in, held *obiter*. Texts and case-law reviewed and discussed.

T. S. Kuppuswami Aiyar, *S. Sitarama Aiyar*, *S. Rajaraman* and *N. Arunachalam* for Appellant in appeal No. 217 of 1950 and Respondent in Appeal No. 151 of 1951.

M. S. Venkatarama Aiyar, *M. Natesan* and *K. Sambasiva Aiyar* for Respondents in Appeal No. 217 of 1950 and Appellants in Appeal No. 151 of 1951.

R.M. ——— *Appeal No.* 217 *of* 1950 *dismissed.*
Appeal No. 151 *of* 1951 *allowed.*

Rajamannar, C.J. and Somasundaram, J.
2nd May, 1955.

Desai Gounder & Co. *v.* Deputy Chief Controller of Imports, Madras.
W.P. Nos. 495 and 605 of 1954.

Imports and Exports (Control) Act (XVIII of 1947) and Import Trade Control Regulation—Insistence on production of Income-tax Verification Certificate by applicants for import quota—Validity—If amounts to unreasonable restriction on the fundamental right to carry on business—Object of Government—If bona fide.

The object of the Government in laying down the conditions that an applicant for licence to import under the Import Trade Control Regulation should produce

the Income-tax Verification Certificate is not to collect the income-tax arrears but is intended to satisfy the Controller that the applicant will be able to meet the financial commitments involved in the import trade, and the solvency and integrity of the importers. Where the Government has necessarily to make a selection of some persons from among a number of applicants for import quota licence it is not unreasonable if the Government prefers persons who are not in default of payment of tax io the Government over defaulters. The condition requiring the production of an Income-tax Verification Certificate is not an unreasonable restriction on a person's fundamental right to carry on business because no one has a fundamental right to obtain a quota under a licence.

(1952) 2 M.L.J. 544 distinguished and explained.

(1955) 1 M.L.J. 234, (1955) 1 M.L.J. 231, (1952) 1 M.L.J. 532 and (1952) 2 M.L.J. 113 referred.

K. Srinivasa Rao, R. Aravamudha Aiyangar and *M. J. Swami* for Petitioner.

The Government Pleader (*C. A. Vaidyalingam*), the Special Government Pleader (*V. V. Raghavan*) and *C. S. Rama Rao Saheb* for Respondents.

R.M. ——— *Petitions dismissed.*

Rajagopala Ayyangar, J. Kumaraswami Chettiar *v.* Krishnaswami Chettiar.
3rd May, 1955. C.R.P. No. 260 of 1953.

Limitation Act (IX of 1908), *section* 10—*Extended period of limitation under—If would apply to cases of ordinary bailment.*

The whole scheme of the Indian Limitation Act proceeds upon a sharp distinction between a bailment as such and an express trust for a specific purpose covered by section 10. The provision of section 10 of the Act cannot be extended to the cases of ordinary bailments.

T. R. Thyagarajan for Petitioner.

R. Santhanam for Respondent.

R.M. ——— *Petition dismissed.*

Rajagopala Ayyangar, J. Kudumbachi *v.* Shanmugam Chettiar.
5th May, 1955. C.R.P. Nos. 229 and 771 of 1953.

Civil Procedure Code (V of 1908), *Order* 41, *rule* 33—*Scope of—Power of Court to reopen a decree under—When could be exercised.*

Order 41, rule 33 of the Code of Civil Procedure, confers jurisdiction on an appellate Court to pass such orders as the case may require in favour of any respondent even though such respondent has not filed any appeal or objection. But this power could be exercised only in a pending appeal. There is no provision for enabling a Court to disturb the finality which an appeal has reached by reason of its disposal. The only known methods under the Code for reopening a decree which has become final are appeal, revision, review and possibly amendments which are really not in the nature of reopening of proceedings. If by resort to any of these methods a proceeding could not be reopened, there is nothing pending before the Court, in the course of which the jurisdiction under a provision like Order 41, rule 33, could be exercised.

(1949) 2 M.L.J. 20 (F.C.) referred and distinguished.

P. N. Appuswami for Petitioner.

R. Ramamurthi Aiyar for Respondent.

R.M. ——— *Petitions dismissed.*

Rajamannar, C.J. and Somasundaram, J.
15*th April*, 1955.

Thayammal *v.* Rangaswami Reddiar.
A.S. No. 246 of 1950.

Practice—Suit originally instituted by three persons as joint plaintiffs—Suit in time as two of the plaintiffs could claim the benefit of the extended period of limitation under section 6 *of the Limitation Act—Subsequent withdrawal of such plaintiffs—Suit if could be continued by the other plaintiff.*

Indian Limitation Act (IX of 1908), *section* 6*—Benefit under—When available to a transferee.*

Code of Civil Procedure (V of 1908), *Order* 32, *rule* 13*—Withdrawal of a co-plaintiff from a suit—Scope and effect of.*

Hindu Law—Reversioner transferring his interest in property after the opening of the reversion—Property already alienated by the limited owner—Reversioner if could affirm the alienation by limited owner to the detriment of the purchaser.

A suit was originally instituted by three plaintiffs, two of whom were entitled to the benefit of the extended period of limitation due to minority under section 6 of the Limitation Act. These two plaintiffs subsequently withdrew from the suit leaving the first plaintiff to continue the same. The suit if originally instituted by the first plaintiff alone would be out of time. On the question whether in the circumstances the suit would be in time and the first plaintiff could continue the same ;

Held : The question whether a suit is barred by limitation should be decided on the facts as they stood on the date of the presentation of the plaint. There is no provision in the Limitation Act under which a suit, which was in time on the date of the institution, could subsequently become barred by time except in cases of an additional party coming on record. For the purpose of deciding the question of limitation the allegations in the plaint and the reliefs claimed must be analysed to ascertain the real nature and scope of the suit.

Held further that the special provision of section 6 of the Limitation Act confers a purely personal exemption on a certain class of persons and the exemption as such cannot be taken advantage of by a transferee from the person under disability.

I.L.R. 9 Cal. 663 and I.L.R. 42 Mad. 637, referred.

It is equally clear that when a person entitled to the benefit of section 6 of the Limitation Act as aforesaid transfers property to another a suit could be filed by the transferor and the transferee and such a suit would not be barred though ultimately the benefit of the decision in the suit would go to the transferee.

I.L.R. 49 Bom. 309 ; A.I.R. 1938 Bom. 358 ; 56 M.L.J. 332, referred.

Order 32, rule 13 of the Code of Civil Procedure provides that where a minor co-plaintiff on attaining majority desires to repudiate the suit he can apply to the Court to have his name struck out and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit. But if the Court finds that he is a necessary party, the Court may direct him to be made a defendant. Under Order 32, rule 1 (4) of the Code, a Court is not authorised to permit one of several plaintiffs to withdraw from a suit without the consent of the others.

Where a minor purports to transfer property which had already been alienated by his guardian to another he cannot convey title to the property as such. He is really transferring his right to recover the properties after setting aside the alienation. But this reasoning cannot apply to a sale by a reversioner, after the reversion has opened, of property belonging to the last male holder which were alienated by the limited owner. The alienation by the limited owner is not *per se* binding on the reversioner and he is not bound to set aside that alienation. A reversioner who has transferred his interest in the property cannot thereafter affirm the alienation by the limited owner to the detriment of the purchaser.

D. Ramaswami Ayyangar and *P. S. Srinivasa Desikan* for Appellants.

M. R. Narayanaswami, N. S. Venkatasubba Ayyar, P. S. Balakrishna Ayyar and *P. S. Ramachandran* for Respondents.

R.M. ——— *Appeal allowed.*

M—N R C

Ramaswami and Ramaswami Gounder, JJ. Janardhanam *v.* Prabakhara.
15*th April,* 1955. A.A.O. No. 494 of 1948 and
A.A.A.O. No. 144 of 1947.

Malabar Law—Custom—Income of property belonging to a Stanom—Arrears of income —Right of succeeding Stani—Customary law of Malabar—If valid and enforceable.

Under the Customary law of Malabar the income of the property belonging to a Stanom is part of the property of the Stanom. If a Stani collects that income it becomes his own. If he does not collect the income but ceases to be a Stani, the income becomes the property of the succeeding Stani, if he collects it.

(History of the law in Malabar as to origin and position of a Stani and his rights, and obligations discussed).

The law which governs the Stanoms in Malabar is Marumakkattayam Law and, as administered by the Courts, it is body of customs and usages which have received judicial recognition. The question whether the unappropriated arrears of income of a Stani, when that Stani goes up to a higher station, or dies, would become the property of his personal heirs or of the successor in title to the Stanom is still in the stage of Customary law and proof of it is required before it can be judicially enforced or recognised.

Such a custom is ancient, certain and invariable and obligatory and the custom is not contrary to justice, equity and good conscience. This custom also forms an essential part of the Malabar agricultural economy and the custom of allowing the unappropriated or uncollected arrears of income to go to the coffers of the Stanom is necessary for upholding the dignity of the Stanom.

K. Kuttikrishna Menon, V. Balakrishna Eradi and T.C. Raghavan for Appellants.

C. Munikanda Menon for Respondent.

R.M. ——— *Orders accordingly.*

Rajagopala Ayyangar, J. Kondayya Chetti *v.*
21*st April,* 1955. Sivasankara Naicker.
C.R.P. No. 870 of 1952.

Madras Agriculturists Relief Act (IV of 1938), *section* 8, *Explanation III—Scaling down of debts under—Renewal of debt—What amounts to.*

There is difference between a promissory note executed in renewal of a debt and a fresh note. Where after the commencement of the Madras Agriculturists Relief Act parties with the knowledge of the provisions of the Act clearly intended to effect a severance between one transaction and another, there is nothing in the Act which prevents this intention of the parties, expressed in unequivocal terms, being given effect to. Where the effect of a transaction is to discharge a promissory note as if by cash payment and the same or different amount of cash is taken on the same date as consideration for a new promissory note, legal effect should be given to the new transaction and it cannot be traced back into any earlier transactions which have been closed.

M. E. Rajagopalachari for Petitioner.

V. Natesan for Respondent.

R.M. ——— *Petition allowed.*

Krishnaswami Nayudu, J. Duggappa Shetty *v.*
21*st April,* 1955. Ragunatha Prabhu.
S.A. No. 625 of 1955.

Transfer of Property Act (IV of 1882), *section* 40—*Covenant running with the land—Personal liability of convenantor—If attached to ownership of property—Transferee when bound.*

Ordinarily in a partition when for purposes of equalisation of shares of immoveable properties a certain sum of money is directed to be paid by one party to the other, the liability arising out of such payment must be deemed to have been impliedly charged on the share of the immoveable property of the party who is liable to make the payment. It is not a mere personal covenant but is a restrictive one in the nature of an obligation annexed to the ownership of immoveable property within the meaning of section 40 of the T. P. Act. Such a covenant is binding upon a

transferee, either under a private alination or in Court auction sale, with notice, actual or constructive.

65 M.L.J. 390; 5 L.W. 234; (1940) 1 M.L.J. 831, referred.

In such a case even if no charge attaches to the property the personal liability to discharge the obligation remains and it is an obligation attaching to the ownership of the property and whoever acquires it does so subject to that liability.

T. Krishna Rao for Appellant.

K. Srinivasa Rao for Respondent.

R.M. ——— *Appeal allowed—No leave.*

Rajagopalan and Rajagopala Ayyangar, JJ.
6th May, 1955.

Sivagurunatha Mooppanar & sons *v.* Income-tax Officer, Madurai.
W.P. Nos. 683 to 686 of 1954.

Indian Income-tax Act (XI of 1922), *section* 28—*Legislative competence of—Levy of penalty for evading tax—Validity—Constitution of India, Article* 14—*If offended by section* 28 *of the Income-tax Act—Levy of penalty by the Income-tax Officer after the assessment is completed—Validity.*

Entry 54 of the Federal list in Sch. VII of the Government of India Act, 1935, empowered the Central Legislature to enact laws with respect to "Taxes on income" and entry 42 of the same list with respect to "offences against laws with respect to any of the matters in that list." The expression 'Taxes on income' is of the widest import and would include taxes in relation to the taxation of evaded income. The content of a law relating to income-tax would comprehend a law designed to prevent evasion of the tax by the levy of suitable penalties. Section 28 of the Income-tax Act introduced by the amending Act of 1939 was validly enacted and within the competence of the Central Legislature.

The said section does not offend the equal protection of laws guaranteed by Article 14 of the Constitution. In some concrete instances there might be overlapping between the provisions of section 28 and the provisions of sections 51 to 53 of the Act. But the two sets of penal provisions are directed to secure very different objects. Sections 51 and 52 have been enacted for vindicating public justice and for the punishment of an offender for deliberate infraction of the law, whereas section 28 is enacted for the purpose of rendering evasion unprofitable and of securing to the State compensation for damages caused by attempted evasion. Section 28 (4) of the Act provides for a concession to the assessee in overlapping cases and if a penalty had been levied from an assessee a prosecution on the same facts is not to be launched. The two remedies are not mutually exclusive but are concurrent.

Helvering v. *Mitchell*, 303 U.S. 390 : 82 L.Ed. 912.

Spies v. *United States*, 317 U.S. 492 : 87 L.Ed. 418.

The penalties imposed under the two sets of provisions of the Income-tax Act, *viz.*, section 28 and sections 51 to 53 to enforce the tax law embrace both civil and criminal sanctions. The former consists of additions to the tax by way of levy of a penalty upon determination of the fact of concealment of income, by an administrative agency and with the burden on the Government to prove its case beyond reasonable doubt. The latter consist of penal offences enforced by the criminal process in the familiar manner. The invocation of one does not exclude resort to the other.

The proceedings for the levy of a penalty under section 28 of the Act must be initiated by an authority when such authority was in seisin of the assessment or other proceedings in the course of which it is found that the assessee has brought himself within the mischief of section 28. It may be that the computation of the exact amount of penalty may have to wait the final assessment after appeal, etc. But this does not mean that the proceedings before the officer has come to an end ousting his jurisdiction to issue a notice to hear the party or to levy a penalty.

R. Kesava Ayyangar and *K. Parasaran* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) *and C. S. Rama Rao Sahib* for Respondents.

R.M. ——— *Petitions dismissed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Ramanathan Chettiar *v.*
6th May, 1955. Veerappan Chetti.
A.A.O. No. 428 of 1954.

Code of Civil Procedure (V of 1908), *Order* 32, *rules* 7 *and* 7 (1-*A*) *as amended in Madras—Object of—Suit for partition of joint family property against the manager and other minor coparceners—Manager how far could represent the minors—Memo. of compromise in such a suit—Essentials required for validity.*

Under Order 32, rule 7 of the Code of Civil Procedure a suit by or against a minor can be compromised only with the leave of Court on application made in that behalf. Sub-rule 1-A of rule 7 of the said Order, introduced by the Madras amendment, lays down the essential formalities to be gone through before such leave can be granted. The first requirement is that along with an application for leave to enter into an agreement or compromise on behalf of a minor, where such a person under disability is represented by a counsel, the counsel shall file into Court with the application a certificate to the effect that the compromise is for the benefit of the minor. The rule further provides that the Court should in its decree or order recite that sanction has been granted and set out the terms of the compromise. Unless the Court grants permission there is no compromise at all so far as minors are concerned and there is nothing on record on which a decree could be passed.

A.I.R. 1952 S.C. 358 at page 360, referred.

Quaere : A compromise being one and entire, can a decree be passed on its footing against some of the executants alone if the others fall out of it?

44 M.L.J. 728 and 27 M.L.J. 76, referred.

In a partition suit where the manager and other adult members are parties and the minor coparceners are also impleaded as *eo nomine* parties it is true that the manager or father does not lose his capacity as such to represent the minor coparceners and enter into a valid compromise binding on them. But where a minor coparcener is represented in a suit by someone else other than the father or manager, a decree cannot be passed binding on the minor without the minor's guardian applying to the Court for leave to enter into compromise according to the provisions of Order 32, rule 7, Civil Procedure Code.

Mayne 11th edn., paragraphs 459 and 301 ; 71 M.L.J. 388 ; I.L.R. 13 Lah. 483 ; I.L.R. 1 Pat. 361 ; A.I.R. 1933 All. 138 ; 27 M.L.J. 76 ; 70 M.L.J. 700 ; (1937) 1 M.L.J. 384 ; (1944) 1 M.L.J. 182, referred and explained.

The manager's right to represent the minor in a suit for the purposes of a compromise is taken away by some one else acting as guardian or next friend.

Order 32, rule 7 of the Code of Civil Procedure overrides any general or customary law and should be strictly contrued so that a minor's interest may not be jeopardised but protected. The policy underlying the provision is that the Court has to protect the interests of a minor in settlement of suits where he is a party and that is best provided by the safeguards of an application for leave to compromise with a certificate from the counsel.

A.I.R. 1951 S.C. 280, explained.

A.I.R. 1937 Mad. 869 ; I.L.R. 39 Mad. 409 ; A.I.R. 1952 Bom. 424, distinguished.

I.L.R. 39 Mad. 115 (P.C.) ; I.L.R. 39 Mad. 853 ; I.L.R. 20 Mad. 378 ; A.I.R. 1946 P.C. 72, followed.

Where in a suit against a minor a next friend or guardian *ad litem* has been appointed and he alone can represent the minor and the kartha of the family or the father of the minor cannot enter into a compromise so as to bind the minor unless the guardian *ad litem* is a party to it.

O. Radhakrishnan and *C. R. S. Chander Rao* for Appellants.

R. Kesava Ayyangar, *K. Parasaran* and *S. Somasundaram* for Respondents.

R.M. ——— *Appeal dismissed.*

Krishnaswami Nayudu, J. Dhanakoti Pillai *v.* Narayana Iyer.
3rd May, 1955. S.A. No. 75 of 1953.

Madras Agriculturists' Relief Act (IV of 1938), *section* 13 *and Negotiable Instruments Act (XXXVI of* 1881), *section* 44—*Promissory note providing for interest at a higher rate than that allowed under the Agriculturists' Relief Act—Applicability of the principle of failure of consideration—Validity of the promissory note—If affected.*

Where a promissory note executed by an agriculturist after the commencement of the Madras Agriculturists Relief Act, 1938, in renewal of an earlier promissory note which was liable to be scaled down under the Act it was contended that the second promissory note is not supported by consideration to the extent of the excess over the sum that would have been payable under the earlier promissory note as sealed down under the Act.

Held : Notwithstanding that a Court can, under the provisions of Madras Act (IV of 1938) give relief to an agriculturist applying the appropriate provisions thereof and scale down a debt in accordance with the principles and at the rate of interest provided it would not make it illegal or unlawful to charge and recover interest at a rate higher than that provided under the Act. If an agriculturist chooses to enter into a transaction and borrows at a rate of interest higher than that provided in the Madras Act (IV of 1938) and discharges the debt by payment at the contract rate of interest it would not be open to him later to question the validity of the consideration and plead failure of consideration and recover the amount so paid.

Applicability of sections 8 and 9 of the Act to cases governed by section 13, considered.

(1941) 2 M.L.J. 307 : (1944) 2 M.L.J. 298, referred to.

(1953) 2 M.L.J. 313, followed.

I.L.R. 26 Cal. 238, referred.

The Madras Agriculturists' Relief Act, 1938, is not declaratory as to rates of interest which should be considered as proper and legal in the case of borrowing by an agriculturist, but only a remedial enactment intended to give relief to agriculturists, whose debts come up for adjudication in a Court of law, and who also can apply to a Court for a declaration of the amount of the debt due by them by applying the provisions of the Act. The Act, however, does not make it illegal for interest being charged and recovered at higher rates than that provided under the Act, even if the borrowing is by an agriculturist. Unless the charging of interest at a rate higher than that provided by the Act and the appropriation or recovery thereof is considered to be illegal, there cannot be a failure of consideration.

T. S. Kuppuswami Aiyar for Appellant.

C. S. Vidyasankaran for Respondent.

R.M. ——— *Appeal allowed. Leave granted.*

Govinda Menon and Basheer Ahmad Sayeed, J. Dasaratha Rao *v.* Ramaswami Iyer.
3rd May, 1955. C.R.P. No. 672 of 1952 &
A.A.O. Nos. 214 and 215 of 1952.

Arbitration Act (X of 1940), *section* 14 (1)—*Arbitration award—Signing of the award by all the arbitrators—Necessity—Failure to sign—If invalidates the award—Doctrine of* functus officio—*Scope and applicability to ministerial acts.*

Limitation Act (IX of 1908)—*Article* 178—*Scope and applicability—Arbitration proceedings—Filing of award into Court by Arbitrator—Applicability of Article* 178.

The signing of an award by an arbitrator is only a formality after it has been made and pronounced. Where an arbitrator who has taken part in the arbitration proceedings throughout along with the other arbitrators and has been a party to the decision and pronouncement of the award, refuses to sign the award after it has been engrossed it could not be a valid ground to set aside the award which has been validly given. What is crucial in the matter of arbitration proceedings is the making of the award and not the formality of signing the same after

it had been made, and mere non-signing of the award by one of the arbitrators who had been throughout a party to the making of the award would not vitiate the award.

(1951) 2 M.L.J. 56, followed.

I.L.R. (1948) Mad. 83: (1947) 1 M.L.J. 297 distinguished.

The proposition that when once an arbitration award has been pronounced the arbitrators having done what they were called upon to do under the submission, becomes *functus officio* thereafter, in regard to the reference, cannot be disputed. But certain ministerial acts such as the engrossing of the award on stamp paper and getting the award so engrossed registered are acts which cannot be put on the same footing as proceedings in connection with the pronouncement of the award.

Where an award is passed, the writing out of it on a stamp paper which would be necessary before it could be filed in Court is merely a ministerial act. But if the award is re-written in the sense that there are substantial changes or material alterations made, then certainly the doctrine of *functus officio* would apply and the arbitrator would be precluded from resorting to such a re-writing of the award already pronounced.

A.I.R. 1941 Pat. 215; A.I.R. 1934 Bom. 6, referred.

A careful scrutiny of Article 178 of the Limitation Act with reference to what is contained in the third column thereof makes it clear that the application to which that article applies is not the application by the arbitrator or umpire, but the application of the party making the reference to the arbitration on whom notice of the making of the award by the arbitrators has to be served. In so far as there is no time prescribed for an application by the arbitrators to file the award into Court either expressly or otherwise, Article 178 cannot apply to them; and it applies only to applications made to the Court by the party who desires that the award should be filed. The mere fact that rules 1, 5 and 6 of the Rules framed by the High Court under the Arbitration Act require that the filing of the award should be by means of an application or petition and that such application or petition is one made under the Arbitration Act would not by itself be sufficient to say that the application of the arbitrator to the Court to receive the award for the purpose of filing the same would be governed by Article 178 of the Limitation Act. The application contemplated in Article 178 cannot have any reference to the arbitrators as such but only to the parties to the reference.

I.L.R. (1946) Bom. 116; A.I.R. 1952 All. 856 referred.

Article 178 of the Limitation Act does not apply to a case where the arbitrators take out an application to file the award in Court.

Per *Govinda Menon, J.*—" On a plain construction of Article 178 of the Limitation Act, along with its position in the third column of the First Schedule of the Limitation Act, it is clear that the article provides for applications by the parties and not by the arbitrator himself. All provisions of the Limitation Act are intended to prescribe a period for taking steps by a party who has perforce to have recourse to a Court of law for getting relief. An arbitrator is not in that position. His situation is analogous to that of an adjudicator resembling a Court and unless the provisions of the Limitation Act expressly provide a period of limitation for any act to be performed by him it is unreasonable to impute any intention to the Legislature that an article of the Limitation Act should control his action. Article 178 of the Limitation Act is applicable only to parties and not to arbitrators. Rules 5 and 6 of the rules framed under the Indian Arbitration Act do not in any way attract the application of the said article to an arbitrator.

A.I.R. 1942 Cal. 532; A.I.R. 1943 Sind 33; A.I.R. 1944 Lah. 398; A.I.R. 1949 All. 234 referred.

A.I.R. 1951 Nag. 32, followed.

D. R. Krishna Rao, M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioner in C.R.P. No. 672 of 1952 and Appellant in C.M.A. Nos. 214 and 215 of 1952.

D. Ramaswamy Aiyangar and *P. R. Varadarajan* for Respondents in both.

R.M. ——— *Appeals and petitions dismissed.*

Krishnaswami Nayudu, J. Arumugham *v.* Velusami Achari.
17th May, 1955. S.A. No. 210 of 1953.

Hindu Law—Administration—Absence of specific provision in texts—Principles of justice, equity and good conscience—Applicability—Murderer—When excluded from succeeding to the estate of the murdered person.

The principle of jurisprudence that a murderer is disqualified from succeeding to the estate of the murdered man is, even apart from Hindu Law, based on principles of justice, equity and good conscience and must be regarded as a rule of public policy. But there is no general disqualification in a murderer in the sense that a murderer *ipso facto* forfeits his right to property in general. What is prohibited is that a murderer cannot take advantage of his act and claim the property of the person he has murdered. If in any particular case there is no question of a murderer taking advantage of the murder, he cannot be excluded either from succession or from survivorship. The test is whether the murderer who claims the property has gained any advantage by the murder, which he could otherwise not have had.

47 M.L.J. 401 : L.R. 51 I.A. 368 : I.L.R. 48 Bom. 569 (P.C.) ; I.L.R. (1947) Bom. 518 and Mayne's Hindu Law, 11th edn., pages 717-718, referred.

A. V. Narayanaswami Aiyar and *R. Venkatachalam* for Appellants.

Sivaswami for Respondents.

R.M. ——— *Appeal allowed : No leave.*

Ramaswami Gounder, J. Shenbagavalli *v.* Dhanalakshmi.
7th July, 1955. C.R.P. No. 157 of 1953.

Madras Buildings Lease and Rent Control Act (XXV of 1949), *sections* 9 *and* 12-*B—Revisional power of District Court as regards orders in execution.*

Section 12-B of the Madras Buildings Lease and Rent Control Act seeks to confer revisional powers on the High Court in respect of an authority functioning in the Presidency Town and in the District Court in respect of an authority functioning in a District, in regard to both the classes of authorities *viz.* the one empowered by section 9 of the Act to execute an order and the other an appellate authority empowered under section 12. This is the natural meaning to be given to the expression as used in section 12-B. The section enables the District Court to call for and examine the records relating to any order passed or proceeding taken under this Act and these words are comprehensive enough to take in execution proceedings.

Quaere : Whether the District Court can entertain a revision from an order in execution where the executing Court is also the District Court in the absence of a District Munsif's or Subordinate Judge's Court under section 9 (*ii*) (*c*).

S. Ramachandra Ayyar for Petitioner.

R. Ramamurthy Ayyar for Respondent.

R.M. ——— *Petition allowed.*

Ramaswami Gounder, J. Hateem Bhai *v.* John.
7th July, 1955. C.R.P. No. 605 of 1953.

Madras Buildings (Lease and Rent) Control Act (XXV of 1949), *section* 7 (2) (*ii*) (*a*)*—Sub-letting—What amounts to.*

A sub lease means giving a right to possession for a definite period for a stated rent. To accommodate a guest, even a paying guest temporarily will not constitute a sub-letting.

O. K. Nambiar for Petitioner.

Daniel Oommen for Respondent.

R.M. ——— *Petition dismissed.*

Ramaswami Gounder, J. Kuppuswami Iyer *v.* Tirunelveli M. C.
8th July, 1955. C.R.P. No. 154 of 1953.

Madras District Municipalities Act (V of 1920), *section* 80 (2) *and Madras Buildings Lease and Rent Control Act (XXV of* 1949), *section* 4—*Assessment of property tax—Rent at which the buildings may reasonably be expected to be let—If should be same as 'fair rent' that may be fixed by the Rent Controller under the Madras Act XXV of* 1949.

The Madras Buildings Lease and Rent Control Act, 1949, is a special Act intended to achieve certain special purposes. It has no connection with the provisions of the District Municipalities Act relating to the determination of the gross annual rental value of buildings. For the purposes of ascertaining the reasonableness of the rental value under section 82 (2) of the District Municipalities Act, the Municipality need not be guided by the fair rent that may be fixed by the Rent Controller under the House Rent Control Act.

T. M. Ramaswami Ayyar and *A. R. Krishnaswami Ayyar* for Petitioners.

T. K. Subramanya Pillai and *P. Pitchai* for Respondents.

R.M. —— *Petition dismissed.*

Ramaswami Gounder, J. Subramanya Bhatt *v.* Devadas Nayak.
8th July, 1955. A.A.O. No. 663 of 1952.

Arbitration Act (X of 1940), *sections* 2 (*c*) *and* 21—'*Court*' *If includes an appellate Court—Power of appellate Court to refer disputes between litigants for arbitration.*

The definition of Court in section 2 (*c*) of the Arbitration Act includes an appellate Court and so under section 21 of the said Act an appellate Court can refer disputes between litigants for the decision of arbitrators. The provisions of section 107 (2) of the Code of Civil Procedure would still empower an appellate Court to refer disputes to arbitration, notwithstanding the fact that the provisions relating to arbitration contained in Schedule II of the said Code has been repealed and re-enacted as a separate Act of 1940.

A.I.R. 1955 All. 353, referred.

A.I.R. 1954 Pat. 106, followed.

I.L.R. (1946) 2 Cal. 492, differed.

T. Krishna Rao for Appellant.

A. Narayana Pai for Respondent.

R.M. —— *Appeal dismissed.*

Balakrishna Ayyar, J. Krishnaswami Ayyar *v.* Natesan.
8th July, 1955. C.R.P. No. 459 of 1955.

Madras Buildings Lease and Rent Control Act (XXV of 1949), *section* 7 (2) (*ii*) (*b*) —*Conversion—What amounts to—Tests to determine.*

In order to attract the provisions of section 7 (2) (*ii*) (*b*) of the Madras Buildings Lease and Rent Control Act, 1949, which entails eviction of a tenant from a building on the ground that he has used the building for a purpose other than that for which it was leased, it is not necessary that the entire demised building should have been put to a purpose other than that for which it was let. If the building has been substantially diverted from the purpose for which it was leased this clause of the Act would apply.

In order to decide whether a building let as a dwelling house is being used for a different purpose, the nature of the trade or business carried on, the nature of the persons coming and going, the duration of their stay, their hours of arrival and departure and purpose of their visits as also the manner in which they conduct themselves when on the premises would all be relevant and material. In cases of this kind the test would be this : Would a fair and reasonably minded person, taking all relevant circumstances into account be prepared to say "this building is no longer a dwelling house ; it has really become a shop or a nursing home or meeting hall or boarding house ?"

K. S. Sankara Ayyar and *V. Sundaresan* for Petitioner.

C. R. Jagadisan and *A. R. Ramanathan* for Respondents.

R.M. —— *Petition dismissed.*

Basheer Ahmed Sayeed, J. Subbanna Sastry *v.* Abdulla.
12th July, 1955. C.R.P. No. 1487 of 1954.

Madras Buildings Lease and Rent Control Act (XXV of 1949), *section* 7 (2) (*ii*)—*Sub-letting —Appointment of manager to conduct business of the tenant on a lump sum payment—If amounts to sub-letting.*

Where a tenant of a business premises entered into an agreement with another by which the other is appointed manager of the tenant's business in consideration of his paying the tenant a fixed amount daily *held* that the document shows that there has been only an appointment of a manager for the conduct of the business, in the premises on certain conditions. The transfer of the management of the business with certain obligations and responsibilities in respect of the management will not amount to sub-letting of the premises.

K. Srinivasa Rao for Petitioner.

K. S. Shetty for Respondent.

R.M. ——— *Petition dismissed.*

Rajagopalan, J. Tower Transports *v.*
13th July, 1955. Raman and Raman, Ltd.
W.P. No. 926 of 1953.

Motor Vehicles Act (IV of 1939), *section* 64-*A—Revisional jurisdiction of the State Government—Failure to adopt a consistent standard—If vitiates the exercise of jurisdiction.*

It is no doubt true that the State Government can take into consideration the fact that a particular applicant for a route permit under the Motor Vehicles Act has not paid the tax and as such prefer an applicant who is not in arrears of tax as against one who is in such arrears. But the Government is expected to adopt a consistent standard in weighing the claims of parties and if default in payment of tax was of no consequence in granting to a petitioner two permits it could not be of any consequence in granting him an additional permit. Failure to adopt a consistent standard consistent with its previous orders in dealing with the claims of parties in relation to the other routes of the same service, vitiates the order of the Government.

G. R. Jagadisan for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *M. Natesan* for Respondents.

R.M. ——— *Rule made absolute.*

Krishnaswami Nayudu, J. Avuddaimmal *v.* Ramaswami Naicker.
13th July, 1955. S.A. No. 555 of 1951.

Practice—Right of ownership and easement—If could be claimed in the alternative.

A plaintiff may claim an easement and ownership in the alternative and a claim to a right of easement cannot be negatived for the reason that initially a right was claimed on the basis of ownership.

I.L.R. 49 Mad. 820 ; I.L.R. 38 Mad. 1 ; L.R. (1914) 3 K.B. 911 ; I.L.R. (1939) Bom. 140, referred to.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Appellants.

C. S. Rajappa for Respondents.

R.M. ——— *Appeal allowed—Leave refused.*

Govinda Menon, J. Soora Rangiah Chettiar *v.*
15th July, 1955. Narayana Chetti.
C.R.P. No. 1163 of 1953.

Limitation Act (IX of 1908), *section* 20—*Payment by debtor without mentioning the purpose—If could save limitation—Oral evidence—If could be let in.*

Where a payment is made under the signature of a person as ' credit ' to a named person without mentioning that the payment is towards a debt, oral evidence can be let in to show the circumstances under which such payment has been made. Such a payment when proved, could attract the operation of section 20 (1) of the Limitation Act.

(1937) 2 M.L.J. 54 ; (1947) 2 M.L.J. 93 ; I.L.R. 1948 Mad. 351 ; (1945) 2 M.L.J. 202, followed.

R. Rangachari for Petitioner.

C. S. Swaminathan for Respondent.

R.M. ——— *Petition allowed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Gopala Menon *v.* State of Madras.
18th July, 1955. C.M.P. No. 10611 of 1954.

Press (Objectionable Matter) Act (LVI of 1951), *section* 3 (*vi*)—'*Grossly indecent or obscene*'—*Subject of* '*Family Planning*'—*If* per se *obscene*.

Undoubtedly a pamphlet or a book on a subject like "Family Planning" dealing with different contraceptive methods will not *prima facie* fall within the category of indecent or obscene publications, though it may contain other descriptions of the sexual organs or may indirectly describe any detail of the act of intercourse, provided the reference has an intimate bearing on the subject, namely, contraception.

(1952) 2 M.L.J. 106, Referred.

T. C. Raghavan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. *Petitior dismissed.*

Basheer Ahmad Sayeed, J. Varadachari *v.* Kandaswamy.
18th July, 1955. C.R.P. No. 1042 of 1954.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 95—*Delivery of possession under*—*Tenant in occupation*—*Right of auction purchaser to remove the occupant as obstructor*—*Madras Buildings Lease and Rent Control Act* (*XXV of* 1949)—*Applicability*.

An auction purchaser in a Court auction sale of a building no doubt becomes the owner of the building. But so long as the building is in the occupation of a tenant, even though the tenancy might have originated under the judgment-debtor all that the auction purchaser would be entitled to will be a symbolic delivery of possession by attornment of the tenant to him. The tenant cannot be removed as an obstructor or trespasser. The auction purchaser will have to resort to the remedies which the present state of law allows, *viz*., to evict the person in possession under the Madras Buildings Lease and Rent Control Act.

R. Aravamudha Aiyangar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

R.M. *Petition dismissed.*

Somasundaram and Ramaswami Gounder, JJ. Kuppan, *In re.*
18th July, 1955. Crl. App. No. 124 of 1955.

Criminal Law—*Practice*—*Death penalty*—*Levy of*—*Rule as to*—*Motive and extenuating circumstances*—*Difference between*.

Ordinarily for the offence of muder, death penalty would be the appropriate sentence and only in cases where adequate reasons exist that rule should be departed from and the lesser punishment thought of.

There is a distinction between 'motive' and 'extenuating circumstances' in defence and the two should not be confused and 'motiye' cannot be treated as an 'extenuating circumstance'.

T. Ramakrishna for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. *Appeal dismissed.*

Somasundaram, J., Mascreen *v.* Mascreen.
28th July, 1955. Crl. Rev. C. No. 179 of 1955.
(Crl. Rev. Petn. No. 174 of 1955).

Criminal Procedure Code (*V of* 1898), *section* 488—*Maintenance of children*—*Duty of*—*Children in the custody of the mother as guardian*—*Mother earning more than the father*—*If liability to maintain shifts*.

Under the Code of Criminal Procedure the duty of maintaining a child is cast upon the father. No such duty is cast on the mother by the Code and there is no scope for invoking any general principles whether the mother or anyone else is liable. The Court is entitled to order a certain amount to be paid to the guardian of the minor children towards the maintenance of the children.

S. Mohan Kumaramangalam for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

M. S. Venkatarama Aiyar and *G. J. Arputhanath* for Respondents.

R.M. *Revision dismissed.*

Rajagopalan, J.
18th July, 1955.

Messrs. Kemp & Co. *v.* Commr. for Workmen's Compensation.
W.P. No. 157 of 1955.

Madras Shops and Establishments Act (*XXXVI of* 1947), *sections* 2 (12), 4 (1) (*a*) *and* 41 (2)—*Person employed in a position of management—Who is to decide—Tests.*

Unless a given person is a person employed within the meaning of section 2 (12) of the Madras Shops and Establishments Act, he cannot avail himself of the appellate right created by section 41 (2) of the Act. Even if he is a person employed, if he is a person employed in a position of management within the meaning of section 4 (1) (*a*) the statute takes away the rights conferred on such persons employed by the provisions of section 41 (2) of the Act among others.

In deciding whether a person is employed within the meaning of section 2 (12) of the Act, it is the requirement of the statutory definitions that will have to be examined ; the common law concepts of employer and employee and master and servant can have no application. The primary duty of deciding the questions whether an employee is a 'person employed' and if so whether he is employed in the position of management is on the Tribunal, *viz.*, the Commissioner.

Messrs. Pais, Lobo and Alvares for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for the State.

K. Bashyam and *S. R. Subramaniam* for Respondent.

R.M. ——— *Rule made absolute.*

Ramaswami Gounder, J.
20th July, 1955.

Murugesan *v.* Hameed Maracayar.
C.R.P. Nos. 303 and 304 of 1955.

Madras Buildings Lease and Rent Control Act (*XXV of* 1949), *section* 12 (1) (b)—*Period of limitation under for filing appeals—Delay—If could be excused under section* 5, *Limitation Act.*

The provisions of section 5 of the Limitation Act cannot be applied to appeals under section 12 (1) (*b*) of the Madras Buildings Lease and Rent Control Act, 1949 and the Court has no power to excuse the delay in filing an appeal under that section beyond the prescribed period of fifteen days.

A.I.R. 1953 Bom. 35, followed ; A.I.R. 1941 All. 207, referred.

O. Radhakrishnan and *G. R. S. Chandra Rao* for Petitioner.

A. Dorairaj for Respondent.

R.M. ——— *Petitions dismissed.*

Somasundaram, J.
20th July, 1955.

Kadikachalam, *In re.*
Crl. Rev. C No. 100 of 1955.
Crl. Rev. P. No. 96 of 1955.

Madras Prohibition Act (*X of* 1937), *section* 4 (1) (*j*)—*Prosecution for possession of ganja—Investigating officer conducting prosecution—Validity.*

Criminal Procedure Code (*V of* 1898), *section* 495 (4)—*Disobedience of the provisions of—If renders the proceedings void.*

Disobedience of the mandatory provisions of section 495 (4) of the Code of Criminal Procedure Code will render the entire proceedings void. Where in a prosecution under section 4 (1) (*j*) of the Madras Prohibition Act, the investigating officer conducts the prosecution the procedure being prohibited by the provisions of section 495 (4) of the Criminal Procedure Code the proceedings are null and void.

Obiter : However illegal the conduct of a prosecution by the investigating officer may be the case has to be considered by the evidence that has been tendered in Court. The evidence is not in any way vitiated because the prosecution is conducted by the investigating officer.

K. Narayanaswami Mudaliar, S. Swamikannu and *R. Lajmi* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Respondent.

R.M. ——— *Conviction set aside.*

Somasundaram, J.
21st July, 1955.

Mariappan, *In re.*
Crl. Rev. No. 316 of 1955.
(R.C. No. 9 of 1955).

Madras Probation of Offenders Act (III of 1937), *section* 3—*If applicable to cases which are punishable only with fine.*

An offence punishable with fine only is an offence of a minor character, of very much less gravity than an offence punishable with imprisonment up to two years. Hence the expression "offences punishable with not more than two years' imprisonment" in section 3 of the Madras Probation of Offenders Act is intended to cover offences punishable with a less severe sentence than those indicated and therefore to include offences punishable only with fine.

[Sections 561 and 561-A of Criminal Procedure Code compared].

I.L.R. 59 Bom. 352 and I.L.R. 60 Bom. 55, followed.

N. T. Raghunathan and *M. Ramachandran* for Accused.

The Public Prosecutor (*V. T. Rangaswamy Ayyangar*) for the State.

R.M. ——— *Reference not accepted.*

Basheer Ahmed Sayeed, J.
22nd July, 1955.

Ulaganathan *v.*
M. C., Virudhunagar.
C.R.P. No. 361 of 1955.

Madras District Municipalities Act (V of 1920), *section* 50 (1) (i)—*Failure to attend meetings—Disqualification for—Absents himself—Scope of—Failure to attend meeting due to causes beyond control, if disqualifies.*

The words 'absents himself' in section 50 (1) (i) of the Madras District Municipalities Act stand in contradistinction to the words 'fails to attend' and it means that the absence should be voluntary absence or there must be some violation on the part of the party which resulted in his not attending the meeting. In a case where a member is prevented from attending a meeting of the District Board for reasons beyond his control, the concept underlying the terminology 'absents himself' must be given a more liberal interpretation. The words 'absents himself' must have some import. Taking the term 'absents' by itself it implies some deliberation and the term 'himself' makes it more significant. Unless there is voluntary absence or there is absence which cannot be explained by a member by any sufficient or good cause, it cannot be said that the person 'absents himself' from attending the meeting.

In re *London & Northern Bank*, (1900) W.N. 114 and *Subnom*, L.R. (1901) 1 Ch. 728, referred.

S. Mohan Kumaramangalam for Petitioner.

Alladi Kuppuswami for Respondent.

R.M. ——— *Petition allowed.*

Rajagopalan, J.
28th July, 1955.

Dandayuthapani Chettiar *v.*
Collector, Salem.
A.A.No. 639 of 1952.

Civil Procedure Code (V of 1908), *Order* 33, *rule* 10—*Court-fee due to the Government in pauper suit—Charge as to—Compromise decree providing for payment by a specified party—If affects the charge.*

The words 'shall be a first charge on the subject-matter of the suit' in Order 33, rule 10, Civil Procedure Code, is a distinct provision, distinct from the other provision that the State Government may recover the court-fee from the party ordered by the decree to pay the same.

(1945) 2 M.L.J. 140, followed.

A.I.R. 1941 All. 221, distinguished.

T. R. Arunachalam and *R. Mathurbutham* for Appellant.

T. Ramakrishna for the Government Pleader.

C. A. Vaidialingam for Respondent.

R.M. ——— *Appeal dismissed.*

Rajagopalan, J.
11th July, 1955.

Vakkat Bapu *v.* Regional Inspector of M.C. & L.B., Coimbatore.
W.P. No. 918 of 1953.

Madras Village Panchayats Act (X of 1950)—*Rules for the conduct of elections of the President of minor Panchayats—Rule* 6—*Polling at an election—If could be conducted piecemeal.*

Rule 6 of the rules for the conduct of election of President to a minor Panchayat under the Madras Village Panchayats Act, 1950, would imply that the election officer should begin counting the votes in each ward in the serial order consecutively. There is nothing in the rules or even in the scheme underlying the rules which provide for piecemeal polling. An election is a continuous process from the commencement of the nomination to the declaration of the result of the polling and its publication.

Where an election of a President to a minor Panchayat could not be completed as a continuous process after its commencement at the appointed hour on the appointed day by the votes of the electors assembled in one of the wards not being counted, there is no alternative, as the rules stand, except to commence the whole process of election afresh, *i.e.*, to count the votes of the voters in the various wards in the course of a single transaction. There is nothing in the rules which authorises the election officer to postpone or to adjourn the election with reference to one ward alone of a minor Panchayat and count the votes in other wards in which the elections are held.

Quaere—Should the voters of each ward assemble in that ward alone or could they assemble in another ward at an election of the President of a minor Panchayat under the Act, and could the voters be assembled in different places within the same Panchayat ?

M. K. Nambiyar and *C. F. Louis* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for the State.

R.M.

Rajagopalan and Rajagopala Ayyangar, JJ.
21st July, 1955.

M. S. Subbalakshmi *v.* C.I.T., Madras.
R.C. No. 43 of 1953.

Income-tax Act (XI of 1922), *section* 16 (i) (c)—*Property settled in trust—What amounts to—Settlement of the future income by exploiting a film subject to a deduction—Validity—Trust of an accrued income retrospectively—If could be made—Retrospective effect of a trust—Test of.*

A trust under which the excess collection from the exploitation of a picture, after the recoupment of the advances paid by the distributor to the author of the trust, is to be paid to the trustees in trust for a named beneficiary is a valid trust. Though it might appear for purposes of accounting that the trust account begins with a debit entry of the advance paid by the distributor against the beneficiary it does not constitute a transfer of a liability. It is a case of transfer of an asset subject to a deduction. Such a trust cannot also be deemed to be a mere transfer of an income constituting its application by the author of the trust after it had accrued to her. In the absence of any benefit, direct or indirect to the settlor under the trust the requirements of the third proviso to section 16 (i) (*c*) of the Income-tax Act are satisfied and the income of the beneficiaries cannot be deemed to be the income of the settlor.

Where the assessee had acted in a picture and as her remuneration for so acting she had obtained from the producer the distribution rights of the picture for certain territories for a period of ten years and the assessee transferred her right to another distributor for a period of four years : *held* that though the distribution rights of the assessee might relate to her remuneration for personal services in its origin, still it is an asset or a property right. The right which the assessee has acquired is an incorporeal right—a species of intangible property—a right to exploit a picture

for a limited duration in a defined territory. It cannot be said that the transfer of such an incorporeal right is only an application of an income and does not amount to transfer of an asset. The distribution rights of the assessee is an asset, which still continued to be hers. The law does not require that any transfer of property should be absolute or permanent in order that it may be valid. But it is not however open to an assessee to say in regard to an income which had accrued to her from an asset which was hers on the date of the accrual of the income, that the asset shall belong to another as and from an anterior date and so convert the income which had accrued to her as the income of another for purposes of assessment to income-tax.

Though a trust deed executed on a particular date recites that it shall be deemed to have commenced at an earlier date, the revenue authorities are not in any way concerned with such a retrospective operation given to that trust. The crucial test is whether the trust was valid and enforceable without the written document.

G. R. Jagadisa Ayyar and *T. V. Balakrishnan* for Applicant.

C. S. Rama Rao Sahib for Respondent.

R.M. ——— *Answer accordingly.*

Rajagopala Ayyangar, J. Subramanian *v.* R. Behari Lal.
21st July, 1955. C.R.P. No. 2241 of 1952.

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Amendment of cause title—Extent of—Substituting the real name for a trade name after judgment—Permissibility.*

Trade names are not traps for the unwary and no person can obtain any advantage when sued in such trade name or in the name in which he had dealings which gave rise to the suit by saying that such a name was actually borne by a dead person and that therefore the suit and decree are nullities.

When the substantive judgment is not being altered, but only the title of the action, the Court has ample jurisdiction to correct any misnomer or mis-description at any time whether before or after judgment. The Court has jurisdiction to alter the title of a suit by describing the defendant in the name he says is his correct name though trading in another name.

The crucial test is 'whom did the plaintiff intend to sue'. It is the person with whom he had dealings. The fact that the name in which the defendant did business was a trade name and happened to be the name of someone who died long ago does not alter the identity of the person who either had dealings with the plaintiff or whom the plaintiff intended to sue.

(1954) 3 All E.R. 659 ; (1955) 1 M.L.J. 337, referred to.

R. Gopalaswami Aiyangar for Petitioner.

M. R. Narayanaswami for Respondent.

R.M. ——— *Petition allowed.*

Ramaswami Gounder, J. Lakshmana Ayyar *v.* State of Madras.
28th July, 1955. Appeal No. 435 of 1951.

Practice—Suit by a Government servant for a declaration of his right to pay and pension on the ground that his dismissal was wrongful—Death of the plaintiff—Cause of action if survives to legal representative.

In a suit in which a Government servant prayed for a declaration that his wrongful dismissal from service did not affect his right to get his pay and pension, it is obvious that if the dismissal were wrongful he would be entitled to his arrears of pay and pension till the time of his death. The suit is in substance for a declaration that he was entitled to certain sums of moneys, which became his, but were in the hands of the Government. The legal representative of the plaintiff in such a suit could ask for a declaration that they are entitled to such moneys, remaining undisbursed in the hands of the Government. The legal representatives would also by themselves be entitled to maintain an action for a declaration that because of the wrongful dismissal of the plaintiff they became entitled to the arrears of pay and pension he was entitled to at the time of his death.

The right to sue for a declaration that a deceased plaintiff was entitled to get his pay and pension is a right which would survive to the legal representatives.

Quaere—When once a legal representative is brought on record could the question whether the right to sue survives to him or not be allowed to be re-agitated at a later stage.

N. Sundara Ayyar and *V. R. Venkatakrishnan* for Appellants.

The Government Pleader (*C. A. Vaidialingam*) and *N. S. Srinivasan* for Respondent.

R.M. — *Appeal allowed.*

Rajagopalan, J.
29th July, 1955.

Srinivasan *v.* Collector of S. Arcot.
W.P. No. 248 of 1955.

Places of Public Resort Act (*II of* 1888), *Rules under—Rule* 18 (*a*)—*Exemption from —If could be claimed as a matter of right.*

The proviso to rule 18 (*a*) of the rules framed under the Places of Public Resort Act, 1888, vests a jurisdiction in the Sub-Divisional Magistrate to grant or to refuse the exemption from the operation of the said rule. But for this proviso, rule 18 (*a*) would be absolute and no licence could be granted under the Act unless the requirement of 50 yards of open space all-round was satisfied.

A statutory authority invested with a discretion is expected to exercise that discretion on a reasonably consistent basis. But the mere fact that an exemption was granted once before in respect of a particular place does not prevent the authority from taking into consideration the then existing conditions at the time of a subsequent application. The exercise of the jurisdiction cannot be said to be vitiated. The grant of an exemption does not enure for ever ; it applies only to the particular licence.

R. Sundaralingam for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for the State.

R.M. — *Petition dismissed.*

Ramaswami, J.
29th July, 1955.

Narayanan *v.* Appukutty.
C.R.P. Nos. 891 & 892 of 1953.

Madras Buildings (*Lease and Rent Control*) *Act* (*XXV of* 1949), *section* 8—*Object and scope of*—'*Amenities*'—*What constitutes*—*Roof of a building*—*If an amenity.*

An amenity is really a convenience. The object of enacting section 8 of the Madras Act XXV of 1949 was to check the prevalent tendencies on the part of some landlords who resorted to extra legal ways in order to make the tenant pay higher rent or make him vacate the premises by cutting off the supply of electricity, water, etc., or locking up a door-way that normally constituted a passage or shutting off a source of natural light and air or in the case of furnished houses, the removing of a fan or a piece of furniture already existing in the house or removing certain articles of daily use that are provided in the kitchen like a grinding stone or mortar, etc., or a bath. An interference with these conveniences would interfere with the proper enjoyment of the demised premises and would constitute an infringement under section 8 of the Act.

But even in the case of interference with the amenities it must be shown that the landlord did so without just or sufficient cause. It would appear that in cases where the tenant in occupation has infringed any statutory rule or regulation, such as electricity ration, lighting restrictions, tampering with certain installations, etc., which makes the landlord liable to the authorities, then the landlord will be justified in cutting off the amenities allowed to the tenant till then.

The roof of a building forms part and parcel of the building and to describe the roof as an amenity is opposed to common-sense.

C. K. Viswanatha Ayyar for Petitioner.

V. P. Gopalan Nambiar for Respondent.

R.M. — *Petition allowed.*

Rajagopalan, J.
2nd August, 1955.

Kathia Pillai *v.* State of Madras.
W.P. No. 707 of 1954.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 23 *(a) (i) and Madras Estates Land (Reduction of Rent) Act (XXX of* 1947), *section* 3 (2-*A*)—*Validity—Constitution of India* (1950), *Article* 14.

Section 23 (*a*) (i) of the Madras Act XXVI of 1948 and section 3 (2-A) of Act XXX of 1947 are valid and they do not offend Article 14 of the Constitution. Article 31-A of the Constitution as amended by the Constitution (Fourth Amendment) Act, 1955, is a conclusive answer to any charge of discrimination based on Article 14 of the Constitution. During the transitional period for which section 23 of Act (XXVI of 1948) provided, persons who held lands in the quondam estate villages were not in the same position as persons who held lands in ryotwari tracts, and any difference in the rates of assessment payable by the two sets of people would not provide any basis for a charge that there has been a denial of equal protection of laws in contravention of Article 14 of the Constitution. Any apparent discrimination in the rates imposed under section 23 (*a*) (i) of Act XXVI of 1948 being higher than the rates prevalent in ryotwari villages could be justified on the basis of a reasonable classification.

V. C. Viraraghavan and *R. Desikan* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) for the State.

R.M. ——— *Petition dismissed.*

Rajagopalan, J.
9th August, 1955.

Sastri Ammal *v.* Pranathartha Naicker.
W.P. No. 425 of 1955.

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *sections* 57 (*b*) *and* 93—*Suit to establish a claim to succeed to the office of hereditary trustee—If barred.*

A right to succeed to a hereditary office is a right to property and a claim to such a right is normally cognisable by a civil Court unless that jurisdiction is ousted by a statute either expressly or by necessary intendment. The bar imposed by section 93 of the Madras Hindu Religious and Charitable Endowments Act would apply to determination by a civil Court of any dispute for determining or deciding which a provision has been made in the said Act XIX of 1951.

Section 57 (*b*) of the Act only provides for determination of the question whether the office of trustee of a given religious institution is hereditary. A dispute between the claimants to succeed to an office, which is admitted on all hands to be hereditary, is not within the scope of section 57 (*b*) of Act XIX of 1951. Neither by express terms nor by necessary intendment does section 57 (*b*) of Act XIX of 1951 divest the civil Court of its jurisdiction to take cognisance of a claim to succeed to the office of a hereditary trustee and that jurisdiction is not vested in the Deputy Commissioner. The only dispute that falls within the scope of section 57 (*b*) is the dispute whether a trustee holds or held office as a hereditary trustee. That does not include within its ambit a dispute respecting a right to succession to a hereditary office.

(Language of section 47 (3) and section 57 (*b*) compared. Scheme of the Act analysed).

All classes of claims to succession to a hereditary trusteeship would appear to be outside the scope of section 57 (*b*).

C. Santhamurthi Naidu and *A. Venkatachari* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for the State.

S. Ramanujachariar for Respondent.

R.M. ——— *Rule made absolute.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Govinda Pathiyar *v.*
8th July, 1955. Ananthanarayana Iyer.
A.A.O. No. 487 of 1952.

Code of Civil Procedure (V of 1908), *Order* 33, *rules* 1, 6 *and* 7 *and Order* 43, *rule* 1 (nn)—*Application for leave to sue* in forma pauperis—*Leave refused and time granted for payment of Court-fees—Non-compliance with order—Main application for leave to sue* in forma pauperis *dismissed—Revision against order refusing leave—Maintainability—Order rejecting the main application—If tantamounts to rejection of a plaint—Failure to appeal from the order rejecting plaint—Appeal from the order refusing leave to sue* in forma pauperis *on the ground of plaint not disclosing a cause of action—Maintainability.*

An order refusing leave to an applicant to sue as a pauper on the ground that the applicant is not a pauper is one from which no appeal is provided but only a revision. But where such an application is rejected on the ground that the allegations do not show a cause of action, an appeal is provided under Order 43, rule 1 (*nn*) of the Code of Civil Procedure. The rejection of such an application for non-payment of the Court-fee directed to be paid within the time granted is only a dismissal for default against which no appeal lies. Hence such rejection is no bar to an appeal under Order 43, rule 1 (*nn*) from the original order refusing leave.

(1955) Andhra W.R. 109 (F.B.) and (1951) 1 M.L.J. 474, followed.

70 M.L.J. 223 ; I.L.R. 59 Mad. 777 ; (1942) 1 M.L.J. 281 and 59 M.L.J. 895, referred.

The order of rejection of a pauper plaint for non-payment of Court-fee is not appealable and there is a remedy to the applicant by way of a suit. Even if that order is appealable, still since the two remedies flow from independent rights, the exercise of one such right is no bar to the exercise of another.

The right to have an appeal against the order refusing leave on the ground that the plaint does not show a cause of action is not lost because the original application for leave to sue *in forma pauperis* itself has been dismissed for non-payment of Court-fees. The rejection for non-payment of Court-fees is only a consequential order, flowing from the non-compliance of a basic order and if the basis goes, the consequence also disappears.

(1954) 1 M.L.J. 544, differed and overruled.

(1955) 1 M.L.J. (N.R.C.) 8, approved.

(1939) 1 M.L.J. 96 : I.L.R. 1938 Mad. 1060 ; 46 M.L.J. 254 ; (1947) 1 M.L.J. 119 and (1948) 2 M.L.J. 150, distinguished and explained.

N. Sundara Ayyar for Appellant.

C. K. Viswanatha Aiyar for Respondent.

R.M. *Reference answered accordingly.*

Rajagopalan and Rajagopala Ayyangar, JJ. Tirumalpad *v.* C.I.T., Madras.
21st July, 1955. R.C. No. 38 of 1952.

Indian Income-tax Act (XI of 1922), *section* 34—*Applicability—' Definite information ' and discovery—What amounts to.*

What section 34 of the Income-tax Act requires is ' definite information ' and as a consequence of that definite information a ' discovery ' by the Income-tax Officer that a portion of the assessee's income had escaped assessment. A mere change of opinion even on a question of law on the part of the Income-tax Officer is not ' definite information ' within the meaning of the section. A deferred assessment is not discovery of escaped assessment and section 34 could not be called in aid to complete an assessment deliberately deferred. Where due to the deliberate procedure adopted by an Income-tax Officer, which turned out to be wrong in law, an income has escaped assessment there is neither ' definite information ' nor ' discovery ' within the meaning of the section.

Quaere : (*i*) Whether an authoritative pronouncement of a High Court on the interpretation of a statutory provision, whether or not it was a High Court that had territorial jurisdiction over the area in which the assessment proceedings were taken, constitute 'definite information' within the meaning of section 34 of the Income-tax Act.

(*ii*) If the pronouncement of a High Court on a question of law on which the Income-tax Authorities held a wrong view constitute 'definite information' within the meaning of section 34, does it apply only to cases of assessment subsequent to the pronouncement, which has been overlooked by the Income-tax Officer in the relevant assessment years.

S. Krishnamurthy for Applicant.

C. S. Rama Rao Sahib for Respondent.

R.M. ——— *Answer in favour of the Assessee.*

Rajagopala Aiyangar, J. Chellam Servai *v.* Ramalingam Servai.
21st July, 1955. C.R.P. No. 966 of 1954.

Code of Civil Procodure (V of 1908), *sections* 145 *and Limitation Act (IX of* 1908), *Article* 182 (5) *of Schedule I—Application for execution of a decree against sureties—When would amount to an application for execution or step-in-aid of execution against the judgment-debtor to save limitation.*

A surety for the performance of a decree is not a debtor or one jointly liable under a decree within the meaning of Explanation (1) of Article 182 (5) of the Limitation Act. But where the remedy pursued against a surety is in effect for the execution of the decree, that is the decree against the judgment-debtor, such a petition is comprehended within Article 182 (5) of the Limitation Act and would keep the decree alive to permit of further execution against other persons liable under the decree and against their properties. But if the proceedings against the surety, having regard to the nature of the obligations undertaken by him in any particular case, does not amount to an execution of the decree passed in the suit and which is sought to be executed against the judgment-debtor, the two proceedings are parallel and the one does not serve as a further starting point or a step-in-aid to the pursuit of the other. The provisions of section 145 of the Code of Civil Procedure makes it clear that to the extent to which he has rendered himself personally liable, a surety's liability is identical with that of the judgment-debtor under the decree. Where the conditions in clauses (*a*) to (*c*) of section 145, Civil Procedure Code, are satisfied an execution petition against a surety would keep alive the decree as against the judgment-debtor and *vice versa.*

I.L.R. 43 All. 152 ; I.L.R. 44 All. 743 ; 68 M.L.J. 119 and A.I.R. 1948 Bom. 13, referred.

But in cases where the special provisions of section 145, Civil Procedure Code, are not satisfied and the surety is not one whose obligation is comprehended within any of the three classes of cases provided for by the said section, this principle does not apply. The principle that an execution against either a surety or a judgment-debtor is an execution or step-in-aid of execution as against the other, applies only to cases where the surety is one against whom the decree passed in the suit may be executed, in other words to a surety to whom section 145, Civil Procedure Code, directly and in terms applies. In the case of other 'sureties' whose liability is not under the decree but under a bond executed as a collateral and ancillary transaction, the execution against the sureties will not save limitation against the judgment-debtor.

51 M.L.J. 239 ; I.L.R. 42 All. 158 ; 65 M.L.J. 507 ; (1943) 2 M.L.J. 444 and (1948) 2 M.L.J. 287, referred.

A. Sundaram Aiyar for Petitioner.

M. R. M. Abdul Karim for Respondent.

R.M. ——— *Petition allowed : E. P. dismissed.*

Somasundaram, J. Avadai Ammal, *In re.*
25th July, 1955. Crl. A. No. 103 of 1955.

Code of Criminal Procedure (V of 1898), *section* 164—*Effect of—Recording of confessions under—Oral evidence—If could be allowed.*

The effect of section 164 of the Code of Criminal Procedure is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates when made during an investigation and to render inadmissible any attempt to deal with them

by allowing oral evidence. This applies to all Magistrates, be they invested with power or not to record confessions. The range of magisterial confessions would be enlarged if Magistrates who are not empowered to record confessions under section 164 of the Criminal Procedure Code are allowed to give oral evidence and that would be clearly circumventing section 164 of the Code. The section confers powers on Magistrates and delimits them. Where a Magistrate has neither acted nor purported to act under section 164, Criminal Procedure Code and nothing has been tendered in evidence as recorded or purporting to be recorded under that section, oral evidence of the Magistrate is not admissible.

71 M.L.J. 476 : I.L.R. 44 Mad. 583 : L.R. 63 I.A. 372 (P.C.), followed.

(1952) M.W.N. (Crl.) 253, doubted.

K. S. Naidu and *V. Venkatesan* for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. C. Lallubhai *v.* K. Mohamed.
4th August, 1955. A. No. 338 of 1950.

Specific Relief Act (I of 1877), sections 19 and 22—Scope of—Practice—Suit for specific performance—Discretion of Court to decree or not—How exercised.

The grant of the relief of specific performance is entirely at the discretion of the Court which, of course, should not be capricious but should be based on law and reason. The relief for specific performance being an equitable relief, a Court is not precluded from denying that relief to a plaintiff, if by any conduct of his the rights of third parties have intervened and the grant of the relief of specific performance to the plaintiff could work undue hardship on the defendants.

No Court is bound to grant the relief of specific performance merely because it is lawful to do so. Section 22 of the Specific Relief Act gives a discretion to the Court to decree or to refuse to decree specific peformance. Section 9 of the Act *inter alia* provides that if in a suit for specific performance the Court finds that there is a subsisting contract between the parties which has been broken by the defendant and it would be lawful to decree specific performance, but at the same time it would be inequitable to do so, the Court has ample powers to award compensation to the plaintiff.

K. Kuttikrishna Menon and *M. Chinnappan Nair* for Appellant.

G. Ramakrishna Aiyar, Md. Ismail, N. Sundara Aiyar and *A. R. Srinivasan* for Respondents.

R.M. ——— *Appeal allowed : Suit remanded.*

Somasundaram, J. Hanumanthiah *v.* C.C.T.O., Madras.
4th August, 1955. Crl. R. C. Nos. 335 and 336 of 1955.
Crl. R. P. Nos. 320 and 321 of 1955.

Madras General Sales-tax Act (IX of 1939), section 15 (b)—Prosecution for non-payment of sale-stax—Tax due by a firm of partners—Prosecution of an individual partner—Legality.

It is now settled law that in cases where a firm has been assessed to sales-tax under the Madras General Sales-tax Act, 1939, it is the firm that must be prosecuted for non-payment of the tax. Strictly speaking when a firm is prosecuted, it is against the name of the firm that the prosecution must lie and not merely against the partners as such. But, mere technicalities apart, where all the partners of a firm are prosecuted the firm being represented by its partners the prosecution is deemed to be against the firm. If in the course of such a prosecution the case against one of the partners of the firm is separated then it ceases to be a prosecution against the firm, as the firm then collapses by one of the partners being proceeded against separately unless it is specifically stated in the complaint that the prosecution is against the firm as such, and the name of the firm is also mentioned therein. For, if the firm as such is prosecuted under its name and style then it does not matter

whether all the partners are before the Court or only some of them. But, for the liability of a firm, conviction against an individual partner alone cannot stand.

T. S. Krishnamurthi Ayyar for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

R.M. *Conviction set aside.*

Panchapakesa Aiyar, J. Karunakaran Nair *v.* Chathu.
5th August, 1955. C.R.P. No. 1281 of 1953.

Code of Civil Procedure (V of 1908), *Order* 21, *rule* 66—*Failure to issue notice under—Judgment debtor not having notice of sale—If an illegality or irregularity—Effect on sale—Remedy of aggrieved party.*

The question whether a failure to issue a notice under Order 21, Rule 66, Civil Procedure Code in execution sales is a mere irregularity or an illegality which would render the sale null and void is one which has to be decided on the facts and evidence of each case. It is possible that in some rare cases a failure to issue such a notice may make the sale void when it is held without the judgment-debtor being ever aware of it. But normally a mere failure to issue a notice under Order 21, rule 66, Civil Procedure Code, to the judgment-debtor, without more, would not make the sale null and void but would only be an irregularity, especially if the evidence shows that the judgment-debtor was well aware of the sale proclamation and the sale.

(1945) 1 M.L.J. 229 : L.R. 72 I.A. 104 : I.L.R. (1945) Mad. 601 (P.C.) distinguished.

(1919) 11 L.W. 59, referred.

(1950) 1 M.L.J. 22, explained.

A.I.R. 1954 Mad. 1024 and (1955) 1 M.L.J. 114, distinguished.

(If a sale is held to be void for want of such notice remedy is under section 47 Civil Procedure Code and if it is a mere irregularity followed by substantial injury the remedy is under Order 41, rule 90, Civil Procedure Code, limitation being governed by Article 181 and Article 166 respectively of the Limitation Act).

V. P. Gopalan Nambiar for Petitioner.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Respondent.

R.M. *Petition dismissed.*

Rajagopala Ayyangar, J. Surendra *v.* Ajwani.
5th August, 1955. C.R.P. No. 473 of 1953.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (3) (*a*) (*i*)—*Protection of Government servant from eviction—If available to Government servant under suspension.*

So long as a Government servant continues to be a Government servant, *i.e.*, till his dismissal, he is ' engaged ' in Government service for the purposes of section 7 (3) (*a*) (*i*) of the Madras Buildings (Lease and Rent Control) Act, 1949, and if that employment is notified as an essential service by the Government he is entitled to the exemption created by that section. A Government servant though under suspension is still entitled to the benefit of the protection afforded by the said section.

D. B. Jagannadha Rao for Petitioner.

A. Subramania Aiyar for Respondent.

R.M. *Petition dismissed.*

Rajagopala Ayyangar, J.
8th August, 1955.

Parvathi Ammal *v.* Subramania Pillai.

C.R.P. No. 475 of 1953.

Court-fees Act (VII of 1870), *section* 7 (iv-A)—*Applicability—Suit challenging the factum of an adoption—Adoption evidenced by a deed—Deed of adoption—When should be set aside.*

An adoption deed is not *per se* a document securing money or other property having monetary value within section 7 (*iv-A*) of the Court-fees Act. What gives validity to an adoption and creates the parental relationship with the right to property is the *factum* and the validity of the adoption and the deed is only a piece of evidence that such an adoption has taken place.

In a case where an adoption is evidenced by a deed and the *factum* or the validity of the adoption is challenged in a suit by a party to the deed, it is not necessary to set aside the deed, which merely recites the adoption and is only evidentiary of it. If on the construction of the deed of adoption the conclusion is reached that it goes beyond the mere recital of the adoption and the consequential rights to property flowing from a valid adoption, that is, if the document constitutes a disposition of property, it would have to be set aside before a party to such a deed can have relief on the footing that the document is not binding upon him or her. If there are dispositions in favour of the adopted son, without reference to his being an adopted son or he is given rights to property which he would not obtain merely as an adopted son, the document would amount to a disposition of property and its validity cannot be challenged without a prayer to set aside the document.

S. Ramachandra Aiyar and *G. M. Alagarswami* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) and *T. M. Chinnayya Pillai* for Respondent.

R.M. ——— *Petition allowed.*

Rajagopalan, J.
10th August, 1955.

Ratna Mudaliar *v.* M.C. Villupuram.

W.P. No. 419 of 1955.

Madras District Municipalities Act (V of 1920)—*Rules relating to the appointment and punishment of officers and servants of Municipal Councils—Rule* 6—*Power of executive authority to suspend an officer or a servant pending enquiry—Scope of.*

The scheme of rule 6 of the rules relating to the appointment and punishment of officers and servants of Municipal Councils, framed under the District Municipalities Act, provide for suspension of a servant even if an enquiry is merely contemplated and even if formal charges have yet to be framed against the municipal servant. The words 'pending an enquiry' in rule 6 include even a contemplated enquiry. But where an executive authority took into account an irrelevant factor along with relevant factors which he could have taken into account, that would be sufficient to vitiate the exercise of the jurisdiction. Where the executive authority constitutes himself a judge in his own cause, the exercise of the jurisdiction is vitiated as being opposed to the basic principles of natural justice.

N. Arunachalam for Petitioner.

K. Bashyam and *T. R. Srinivasan* for Respondent.

R.M. ——— *Rule made absolute.*

Rajagopalan, J.
11th August, 1955.

Srinivasa Desikachariar *v.*
Revenue Court of Tanjore.
W.P. No. 1056 of 1953.

Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952), *sections* 8 (1), 10 (1) (*c*) *and* 13 (1)—*Labour expended by the tenant and members of his family in harvesting and poradi—Wages for—If could be deducted to estimate the gross produce available for division—*

Kanganam charges—If deductible—Dispute by the land-owner that the tenant has failed to manure the land as a result of which the produce has become less—Claim for damages—If Revenue Court could decide under section 13 (1)*—Section* 10 (1) (*c*) *entailing eviction of tenant for failure to manure—If a bar to enquiry for damages under section* 13.

Under section 8 (1) of the Tanjore Tenants and Pannaiyal Protection Act, 1952 what is liable to be divided is the gross produce after deducting all harvesting and poradi charges in the case of paddy. The harvesting and poradi charges referred to in that section refer to the charges actually incurred by the tenant by payment of wages to any person other than himself and the members of his family. The scheme of the Act does not provide for any claim for wages for labour contributed by the cultivating tenant either his own or that of the members of his family. It is the contribution of labour, either his own or that of the members of his family, in the cultivation of the land that makes a person a 'cultivating tenant' within the meaning of section 2 (*d*) of the Act and as such there is no scope to evaluate in terms of wages the labour expended by him. 'Kanganam' or supervision charges incurred at the time of harvest is deductible if actually incurred either by the tenant or land-owner.

In a petition under section 13 (1) of the Act if the land-owner claims damages for diminution in the actual gross produce on the land occasioned by the failure of the tenant to manure the land, it would be a dispute within the meaning of the section which has to be decided by the Revenue Court. The fact that section 10 (1) (*c*) of the Act provides specifically for eviction of the tenant on the ground of negligence of legitimate duty which is destructive or injurious to the land—non-manuring of the land being one such—does not prevent the Revenue Court from deciding the dispute as to damages for smaller return due to the default of the tenant. The relief of eviction would fall under section 10 (1) of the Act and the claim for damages would be an independent dispute within the meaning of section 13 (1).

Where a Revenue Court refuses to decide such a question on an erroneous interpretation of the two provisions of the Act it amounts to a failure to exercise the jurisdiction vested in the Tribunal and the order is liable to be quashed.

D. Ramaswami Aiyangar and *M. K. Ramaswami* for Petitioner.

V. Srinivasan for the Special Government Pleader (*V. V. Raghavan*) and *M. E. Rajagopalachari* for Respondents.

R.M. ——— *Rule made absolute Direction sgiven.*

Balakrishna Ayyar, J.
11th August, 1955.

In the matter of Last will & Testament of Emma Sarah Sibthorpe—*Deceased.*
Diary No. 9318 of 1955.

Court-fees Act (*VII of* 1870) *as amended in* (*Madras Act XIV of* 1955), *section* 56—*Fee for grant of Probate or Letters of Administration—How estimated.*

Ordinarily the estate of a person as on a certain date would, in the eye of law, be the original corpus *plus* all the accretions that have been lawfully made to it less everything that has been lawfully taken away from it. The dividends payable on certain shares in a company would therefore be accretions to the estate unless they have been lawfully subtracted from it. The fact that the dividends have been remitted abroad makes no difference, if the remittance was without legal authority. Such a deduction from the estate of the deceased will be an unlawful one and cannot be recognised for purpose of duty. Hence duty must be paid in respect of the dividends also.

Sampath Kumar for Messrs. King and Partridge for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for the State.

R.M. ——— *Orders accordingly.*

Somasundaram, J. Muthurangan *v.* Ananthanarayanan.
16th August, 1955. C.R.P.No. 545 of 1953.

Indian Evidence Act (I of 1872), section 162—Documents in respect of which privilege is claimed—Jurisdiction of Court to compel production even for inspection—When ousted.

Under section 162 of the Indian Evidence Act a Court, if it sees fit, may inspect documents in respect of which privilege is claimed, unless it refers to matters of State. This clearly shows that if the documents refer to matters of State the Court may not even inspect the document, that is it may not even compel the production of the documents. The decision whether the production of a document would be prejudicial to public interests is to be taken by the officer concerned and not by the Courts and once he has taken such a decision and claimed privilege it is conclusive and it has got to be examined only to see whether it refers to matters of State.

A.I.R. 1950 Bom. 230 ; A.I.R. 1951 Bom. 72 ; I.L.R. 39 Mad. 304 ; I.L.R. 32 Mad. 62 : 19 M.L.J. 263, referred and followed.

A.I.R. (1931) P.C. 254 : 61 M.L.J. 943 and L.R. 1942 A.C. 624, referred.

K. Veeraswami and *G. Ramanujam* for Petitioner.

S. S. Ramachandra Ayyar and The Government Pleader (*C. A. Vaidialingam*) for Respondents.

R.M. ——— *Petition dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. Serang Abdul Khadir *v.*
17th August, 1955. Rajagopala Pandarayar.
W.A. No. 9 of 1955.

Tanjore Tenants and Pannaiyal Protection Act (XIV of 1952), section 2 (d) and (g)—'Cultivating tenant' and 'Land-owner'—Meaning of—Receiver if land-owner—'Tenancy agreement express or implied'—If should be with the land-owner in order to constitute a cultivating tenant.

A Receiver virtually represents the real owner of the property in his possession. He would therefore be the owner for the time being of the property and would fall within the definition of 'land-owner' in section 2 (*g*) of the Tanjore Tenants and Pannaiyal Protection Act, 1952.

In the definition of the word 'cultivating tenant' in section 2 (*d*) of the Act the words are merely 'a tenancy agreement express or implied' and it does not specify that such agreement must be with the land-owner as defined in section 2 (*g*). Persons who contribute their own physical labour, or that of the members of their family in the cultivation of land belonging to another and who are so cultivating under a tenancy agreement, that is to say, not as trespassers or as owners, will be within the definition of the term 'cultivating tenant'.

(1954) 1 M.L.J. 277, followed.

It is true that some of the provisions in the Act appear to be inappropriate to a case where the tenant actually cultivating has not entered into a tenancy agreement with the land-owner himself. But this is no reason why the rights of persons lawfully on the land cultivating with their own physical labour should be negatived.

T. R. Ramachandran for Appellant.

The Special Government Pleader (*V. V. Raghavan*), *S. Nagaraja Rao* and *G. R. Jagadisan* for Respondents.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J. State of Madras *v.* M. E. Tramways.
19th August, 1955. O.S.A. No. 36 of 1954.

Indian Companies Act (VII of 1913), sections 162, 166, 271 and 276—Foreign Companies—If could be wound up by Indian Court—Application of the provisions of the Act to winding up of unregistered Companies—Directors of a Company—If can apply for winding up.

Under section 271 (3) of the Indian Companies Act a company incorporated outside India, which has been carrying on business in India ceases to carry on business in India it may be wound-up as an unregistered company under Part

IX of the Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated. Section 276 of the Act enacts that the provisions of Part IX of the Act relating to unregistered companies shall be in addition to, and not in restriction of, any provisions in the Act with respect to winding up of a company by the Court. But an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under the Act, and then only to the extent provided by that part. Section 166 of the Act will apply to the winding up of unregistered companies as well and as such an application to the Court for winding up of a foreign company, as an unregistered company, can be presented either by the company or by any creditor or contributory.

The directors of a company can validly present a petition for its winding up even without the sanction of the general body of share-holders.

In re *Galway, etc., Tramways Co.* (1918) 1 Ir. R. 62 differed.

Palmer's Company Law, 19th Edition and Palmer's Company Law Precedents 16th Edition referred and followed.

A.I.R. 1953 Pepsu 195 differred.

The Advocate-General (*V. K. Thiruvenkatachari*) and The Assistant Government Pleader (*K. Veeraswami*) for Appellant.

O. T. G. Nambiar instructed by *Messrs King and Partridge* for Respondent.

R.M. ——— *Appeal dismissed.*

Krishnaswami Nayudu, J.
22nd August, 1955.

Kuppammal *v.* Pothanna Chetty.
S.A. No. 1014 of 1951.

Indian Stamp Act (II of 1899), *section* 36 *and Civil Procedure Code (V of* 1908), *Order* 13, *rule* 4—*Instrument not duly stamped—Objection as to—Bar under—Scope of—'Admitted in evidence'—What amounts to—Endorsement on the document under Order* 13, *rule* 4, *Civil Procedure Code—If conclusive.*

The mere fact that an endorsement has been made by a Court, as required by Order 13, rule 4, Civil Procedure Code on a document produced before it should not in every case be considered sufficient to hold that the document has been admitted. In cases where no objection has been raised as to the admissibility of a document on the ground of insufficiency of stamp and an endorsement of admission under Order 13, rule 4, Civil Procedure Code is made and objection to such admissibility is not taken even at any stage of the trial of the suit it will not be open to any party to raise the objection in appeal before any other forum to which the matter might be taken up. But to hold that by the mere mechanical act of stamping the endorsement under Order 13, rule 4 the Court has applied its mind as to the admissibility on the document, would be to deny the Court the right to reject the document if it is found that it has been insufficiently stamped and therefore inadmissible in evidence. So long as the objection has not been considered by the Court, the endorsement under Order 13, rule 4, Civil Procedure Code, could be considered only to be a mechanical act and not the result of the exercise of the judicial mind as to its admissibility.

I.L.R. 53 Mad. 137 : 56 M.L.J. 233 followed.
Case-law discussed and explained.

Though the language of section 36 of the Stamp Act is clear and unambiguous, the admission contemplated by the section is the result of judicial determination as to its admissibility when an objection is raised ; and the mere stamping of the endorsement under Order 13, rule 4, Civil Procedure Code, prior to the determination as to admissibility is only a mechanical act which does not constitute 'admission' under section 36 of the Stamp Act.

A. V. Narayanaswami Ayyar for Appellant.

Respondent not represented.

R.M. ——— *Appeal dismissed.*

Krishnaswami Nayudu, J. Raman Nambudripad *v.* Govindan Nair.
13*th July*, 1955. S. A. No. 547 of 1951.

Malabar Compensation for Tenants Improvements Act (*I of* 1900), *S.* 3 (1) *—'Tenant'—Scope of—Right to compensation—When available.*

In order to claim compensation for the value of improvements under the Madras Act I of 1900 a person must be a 'tenant' as defined by the Act. The benefit cannot extend to persons who do not strictly come within the category of persons described in the definition of 'tenant' under the Act.

M. K. Nambiar for Appellant.

N. Sundara Ayyar for Respondent.

R. M. *Appeal allowed.*

Rajamannar, C. J. and Rajagopala Ayyangar, J. Santhamma *v.* Neelamma.
21*st July,* 1955. R. C. No. 18 of 1953.

Madras Aliyasanthana Act (*IX of* 1949)*—Chapter VI—Legislative competence—Joint family and partition—If covered by Entries* 2 *and* 3 *of Sch. VII of the Government of India Act,* 1935*—Fixation of shares in partition—If discriminatory and unreasonable—Constitution of India—Articles* 14 *and* 31*—If violated.*

On a reference whether (*a*) Chapter VI of the Madras Aliyasanthana Act (IX of 1949), which was passed by the Madras Legislative Assembly and which received the assent of His Excellency the Governor-General on 13th April, 1949, is repugnant to clause (3) of section 100 of the Government of India Act 1935 and *ultra vires*.

(*b*) Whether the subjects of the joint family and partition in respect of which parties in judicial proceedings were governed by their customory personal law before the enactment of the Madras Aliyasanthana Act (IX of 1949), were included in any of the Entries 2 and 3 of Sch. VII of the Government of India Act, 1935.

(*c*) Whether the scheme of fixation of shares at a partition in an Aliyasanthana family by Act (IX of 1949) arbitrary in its application, discriminatory and unreasonable in its operation and confiscatory in effect and therefore offends the fundamental rights secured by the Constitution of India.

Held: The impugned provisions of the Madras Aliyasanthana Act are valid in their entirety.

Chapter VI of the Madras Aliyasanthana Act was within the legislative competence of the then Provincial Legislature under the Government of India Act, 1935. The subject of partition in a joint family including an Aliyasanthana kutumba would fall within the entry 'transfer' in item 21 of the Provincial list and item 8 of the Concurrent list of the Government of India Act. Moreover the expressions 'devolution' and 'succession' are of wide import and are apt to cover partition in a Hindu family.

The Madras Aliyasanthana Act will apply to land and properties situate within the province of Madras and the fact that the individuals who are entitled to shares in the properties belonging to these families happen to reside outside the province is wholly irrelevant for considering the validity of the enactment.

The termination of the ejaman's right to manage family property and to regulate its internal economy by the provision for disruption of the family by a demand for partition as enacted in section 35 of the Act is not in violation of Art. 31 (2) of the Constitution. The right of the ejaman to manage the family property is not a right of property within the meaning of either Art. 19 or Art. 31 of the Constitution. It is only a right based on the theory of implied consent on the part of the other members.

(History of the legislation considered.)

The deprivation of property referred to in Art. 31 of the Constitution has nothing to do with the so-called impairment of rights involved in a partition in a family or with the allotment of shares to the divided groups.

Section 35 or section 36 of the Act does not violate Art. 14 of the Constitution. The provisions of the enactment does not violate the equal protection of the laws guaranteed by Art. 14 of the Constitution and cannot be challenged as unreasonable or irrational.

K. V. Venkatasubramania Aiyar, S. Ramayya Nayak, T. Krishna Rao, K. S. Hedge and *A. S. Raman* for Applicant.

The Advocate-General (*V. K. Tiruvenkatachari*), *The Government Pleader* (*C. A. Vythilingam*), *M. K. Nambiar* and *G. K. Govinda Bhatt* for Respondents.

R.M. *Answered accordingly.*

Rajagopalan, J.
17th August, 1955.

S. R. V. S., Ltd., Kumbakonam Branch *v.* State of Madras.
W. P. No. 503 of 1954.

Industrial Disputes Act (*XIV of* 1947), *section* 2 (k), *section* 10 (1) (c) *and section* 33-*A—Industrial dispute—Reference to adjudication—When could be questioned—Individual and collective dispute—Industrial establishment—What is—Establishment with branches—Head Office—If could represent the branches which are themselves industrial establishments.*

A writ of *certiorari* could not issue to set aside a reference under section 10 (1) (*c*) of the Industrial Disputes Act as such a reference is an administrative Act performed by the Government. If the factual existence of an industrial dispute is not in dispute the determination afresh by the Government of the question of the expediency of referring such a dispute for adjudication under section 10 (1) (*c*) of the Act does not amount to a review of any question judicially determined previously. The fact that a prior order of the Government under section 12 (5) of the Act refused to refer for adjudication of a given dispute does not affect the jurisdiction of the Government to exercise the statutory power conferred upon it by section 10 (1) (*c*) of the Act on any subsequent occasion.

(1953) 1 M.L.J. 211 (S.C.); and W. P. No. 537 of 1954, referred and followed.

But though a writ of *certiorari* could not be issued to set aside an administrative act of the Government the validity of a reference under section 10 (1) (*c*) of the Act could be canvassed and decided if the question whether an alleged dispute is an industrial dispute at all is itself in dispute. It is the jurisdicton of the tribunal that is questioned in such cases. A dispute between an individual worker and his employer is not an industrial dispute and section 33-A of the Act does not alter the position.

(1949) 2 M.L.J. 789; (1951) 1 M.L.J. 213; and A.I.R. 1953 Pat. 320, Referred and followed.

A.I.R. (1954) All. 516 and (1953) Lah.L.J. 757, doubted.

The scheme of the Industrial Disputes Act provides for the adjudication of an industrial dispute between the workers and the employers in a given industrial establishment. Section 10 (5) of the Act is an enabling provision to extend the scope of reference for adjudication of an industrial dispute, which by itself governs only a given industrial establishment, to any other establishment, group or class of establishments of similar nature which are likely to be interested in or affected by such a dispute.

An industrial establishment as such has not been defined by the Act. But there is little difficulty in determining the scope of that expression as used in the several sections of the Act. An establishment will be a separate industrial establishment within the meaning of the Act even though that establishment might only be a branch of a large industrial concern with branches within and outside the State. As such the Kumbakonam Branch of the S. R. V. S., Ltd., is a separate industrial establishment though it was a branch of the S. R. V. S., Ltd. with its head office at Madras. Unless a dispute exists between the workers and the management of that industrial establishment, the mere fact that disputes existed between the Madras Union and the Management is not enough to constitute an industrial dispute in that establishment in the absence of proof that the Kumbakonam branch espoused the cause of the Madras Union and made it their collective dispute.

In order that a particular labour union of the head office of an industrial establishment could represent the cause of the labour in a branch office—which is a separate industrial establishment—an appreciable number of workers of the branch should be members of the Union of the Head Office and such members should espouse the cause of the head office union and make it their collective dispute.

M. K. Nambiar, M. V. Jagannath and *A. R. Tyagarajan* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*), *R. Raghavachari* and *S. Mohan Kumaramangalam* for Respondents.

R. M. *Rule made absolute.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
24th August, 1955.

Ramaswami Thevar *v.*
K. M. Marakayar.
Appeal No. 734 of 1950.

Hindu Law—Limited owner—Alienation by—Validity beyond lifetime—Proof of necessity—Onus of—Hindu widow—If could alienate property for payment of interest on debt—Facts to be taken into consideration in deciding whether or not to set aside a sale by a widow.

A Hindu widow, who inherits an estate, undoubtedly takes only a limited interest therein. She is at liberty to sell or otherwise dispose of her limited interest. She has also the power, though a very restricted and qualified power, under the law, to convey a larger interest than she has and pass an absolute title to her alienee, provided the transaction is substantially justified by legal necessity or benefit. Those who deal with a female limited owner, but claim to have acquired more than her limited interest, must prove facts and circumstances justifying the alienation of a larger interest by her. The burden of proof is on the alienees from the limited owner to establish either (*a*) that the alienation was justified by legal necessity or was for the benefit of the estate or (*b*) that they had made reasonable and *bona fide* enquiries as to the existence of the necessity or benefit and satisfied themselves about the same before taking a sale or mortgage from the limited owner binding the entire estate. The onus is not on the reversioner to prove that the estate left by the last male owner was sufficient to meet the claims against it and the needs of the limited owner and that the alienation was unnecessary. Lapse of time does not shift the burden of proof from the purchaser to the reversioner who impugns a sale by the limited owner, and it is incorrect to say that the necessity should be presumed from mere lapse of time. Recitals of necessity in deeds of sale would be merely evidence of representations made to the purchaser by the limited owner and of his having acted on the faith of such representation after due and *bona fide* enquiries. Presumption to fill up gaps in the evidence regarding the necessity for an alienation which time has obliterated can be invoked apart from recitals. Even if there are no recitals, it can be shown by evidence *aliunde* that a sale was effected by the limited owner for a necessary purpose or for the benefit of the estate.

Normally a Hindu widow is bound to pay interest on the debts from the income of the property enjoyed by her as limited owner, provided that income has got a surplus over her legitimate needs for maintenance and the preservation of the estate, both physically and against hostile litigation; and a sale of a portion of the property in such cases to pay the interest on the debts accruing during her period will not be covered by legal necessity, though where the amount covered by such interest in the consideration for a sale deed is small, the sale deed may be upheld in full. But a widow is not bound to apply the surplus income to the payment of the principal amount of the debts, and can enjoy the entire surplus herself and can alienate properties for paying off the principal amount of the debts. The proportion between the portion of the consideration covered by necessity and the portion not covered by necessity has to be considered by a Court when it decides whether to set aside the alienation or to confirm it subject to terms. Each case has to be decided on its own merits.

R. Kesava Aiyangar and *K. Parasaran* for Appellants.

T. R. Srinivasan, S. Gopalaratnam, A. K. Annaswami Aiyar and *R. Desikan* for Respondents.

R.M. ——— *Appeal dismissed.*

Krishnaswami Nayudu, J. Gopalan Nair *v.* Narayana Kurup.
24th August, 1955. S.A. No. 1530 of 1951.

Practice—Property belonging to a tarward—Sale in execution of a decree against a receiver of the property appointed pending a partition suit—If would bind the party to whom the property is ultimately allotted in the partition—Scope and extent of the representative character of a Receiver.

A Receiver is appointed for the preservation of the properties which are the subject matter of a suit for the benefit of the parties who might be declared entitled to the same. The result of such an appointment is that the properties pass into '*custodia legis*'. But the order appointing a receiver does not operate to divest the parties of their ownership. It would be competent for the receiver to commence execution or continue execution proceedings commenced by the parties to the suit. The representative character of a receiver is only for the purpose of representation in the actions started by or to be instituted on behalf of the parties.

If a creditor files a suit against his debtors in respect of whose estate a receiver has been appointed by Court he must make his debtors parties to the same and the only difference that the appointment of a receiver makes is that if the property in the hands of the receiver is intended to be affected by the result of such a suit, the receiver has got to be made a party after obtaining leave from the Court. This is to be by way of addition to and not in substitution for the parties who are primarily responsible. It will not be open to a third party to institute an action against a Receiver of an estate appointed by Court during the pendency of a suit without making the parties who are sought to be made liable under the decree and who are interested in the properties as parties to the suit or execution proceedings.

[Position of a Receiver compared with that of the Official Assignee or Official Receiver.]

A.I.R. 1946 Cal. 127 followed.

(1951) 2 M.L.J. 517 distinguished and explained.

A. Achuthan Nambiar for Appellant.

V. P. Gapalan Nambiar and *P. Bhaskara Menon* for Respondents.

R.M. ——— *Appeal dismissed: Leave refused.*

Basheer Ahmed Sayeed, J.
11th August, 1955.

Ponnayya Nadar *v.* Patel.
C.C.C.A. No. 2 of 1953.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 6 (*b*), *Proviso—Refund of excess rent paid—Amendment of Act limiting quantum for a period of one year from date of determination of fair rent—If retrospective—Rent Controller fixing fair rent—Order modified on appeal—Date of original or appellate order taken into account for calculating excess—Section* 20 *of the Amending Act* (*VII of* 1951)—*Scope of.*

Where an order fixing the fair rent for a particular premises by the Rent Controller is taken up on appeal and the appellate Court modifies the order of the Rent Controller the date with reference to which the refund or recovery of excess rent should be worked out will be the date of the appellate order which alone is final and not the date of the original order of the Rent Controller. Where a provision has been made for the orders of Rent Controller being revised or modified by a superior tribunal, it is the final order passed by the appellate or revising tribunal and not the order of the Rent Controller that becomes final. The determination of fair rent takes place only by virtue of the order of the appellate tribunal which gives finality to such determination.

The amendment introducing a proviso to section 6 (*b*) of the Act limiting the recovery of excess rent paid to a period of one year back from the date of the determination of the fair rent will govern all pending cases, including appeals, by virtue of section 20 of the Amending Act VIII of 1951, which gives retrospective effect to the Amending Act.

(1954) 1 M.L.J. 19 (N.R.C.) followed.

Section 20 of the Amending Act would apply to all proceedings whether they be under section 7 or section 6 of the Act.

In order to entitle a tenant to claim a refund or adjust the excess rent paid before the determination of the fair rent, the tenant should have paid such excess rent during the relevant period, namely one year immediately before the determination of the fair rent. If the tenant has not paid any rent for that period there is no question of his claiming any refund of the excess which does not exist to be claimed.

S. Amudachari and *A. V. Raghavan* for Appellant.

G. T. Ramanujachari for Respondent.

R.M. — *Appeal allowed: Decree modified.*

Rajagopalan, J.
17th August, 1955.

Naina Mahomed *v.* State of Madras.
W.P. No. 167 of 1955.

Madras Village Panchayats Act (X of 1950), *sections* 92 *and* 93—*Power of Panchayat to refuse a licence—If an unrestricted one and void—Failure to frame rules under section* 93 *to regulate the procedure under section* 92—*If affects the jurisdiction of the Panchayat—Constitution of India, Art.* 19 (1), (*g*)—*If offended.*

Though section 92 of the Madras Village Panchayats Act does not in express terms provide for the refusal of a licence by the Panchayats the power of refusal is conferred upon them by necessary intendment. In form the section prohibits the construction of a factory or installation of machinery without the permission, *i.e.*, licence granted by the Panchayats. This confers on the Panchayats a power to grant or refuse permission.

No doubt there are no express provision in section 92 of the Act itself as to the considerations that would be relevant to justify the refusal of a licence. Nor are there any rules framed in this regard. But this by itself does not mean that the power of refusal to grant a licence is uncontrolled or unrestricted. The relevant considerations that should weigh with a panchayat in granting or refusing to grant a licence under section 92 of the Act can be gathered from the context of the section and from the scheme and policy of the Act.

No doubt section 93 of the Act provides that rules could be framed by Government for prohibiting or regulating the grant of permission under section 92 of the Act. But the existence of such rules is not a condition precedent to the exercise of the jurisdiction conferred upon the Panchayats under section 92. Section 93

is an enabling section and if rules are framed under section 93 (1) (*c*) the panchayats will be bound by it and they will have to conform to those rules. In the absence of such rules the panchayats will have to conform to the standards which could be gathered from the provisions of the Act. That is they will have to consider an application with reference to public safety, convenience and health for which provisions have been made in the chapter of the Act in which section 92 occurs.

Section 92 of the Madras Act X of 1950 does not offend Article 19 (1) (*g*) of the Constitution of India and is saved by Article 19 (6).

R. Sundaralingam for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*), the Special Government Pleader (*V. V. Raghavan*) and *Messrs. Chetty and Chetty* for Respondents.

R.M. — *Petition dismissed.*

Rajagopala Ayyangar, J. Kalathy Chetty *v.* Gen. Manager, B.N. Ry.
17th August, 1955. C.R.P. Nos. 447 & 448 of 1953.

Indian Railways Act (IX of 1890)*—Liability for short delivery—Goods loaded in wagon and receipt issued by Railway being endorsed as 'said to contain'—Railway not affirming the weight or number of packages loaded—Liability for short delivery.*

The principle that the Railway authorities will be absolved from liability for any short delivery in cases where they do not affirm or certify the weight or quantity loaded in the wagon but only issue the receipt as 'stated to contain' is not applicable to a case where the number of units loaded could be assessed with certainty. Such circumstance can be relied upon as absolving the Railway from liability only in cases where there is no standared weight for the units loaded in the wagon and there is no means of ascertaining with any exactitude the number of bags loaded into it.

A.I.R. (1950) Nag. 85 and (1955) 1 M.L.J. 53 (N.R.C.) referred and distinguished.

T. S. Krishnamurthy for Petitioner.

S. S. Ramachandra Ayyar for Respondent.

R.M. — *Petition allowed.*

Somasundaram, J. Rangaraja Das *v.* Ramanathan Chettiar.
23rd August, 1955. C. R. P. No. 649 of 1955.

Code of Civil Procedure (V of 1908), *Order* 21, *rules* 66, *and* 69*—Execution sale adjourned due to stay of proceedings by any special statute like the Madras Act V of* 1954*—Necessity for fresh proclamation after the expiry of the stay.*

Where a sale in execution of a decree is adjourned after the settlement of the terms of sale proclamation, not at the discretion of the Court, but because of some new statutory provision like the Madras Indebted Agriculturists (Temporary Relief) Act (V of 1954) which stayed all such proceedings for one year, there is no need for a fresh proclamation in the manner prescribed by Order 21, rule 66, Civil Procedure Code. There is no obligation to give any fresh notice either to the judgment-debtor if the proclamation is re-published without any alteration.

G. Ramanujam for Petitioner.

A. Sundaram Aiyar for Respondent.

R.M. — *Petition dismissed.*

Somasundaram, J. Nalla Goundan *v.* Pappammal.
24th August, 1955. C.R.P. No. 1151 of 1953.

Code of Civil Procedure (V of 1908), *section* 151*—Applicability—Plaintiff's suit dismissed on the ground that it was not maintainable as the question involved has been decided against him in an earlier suit between the same parties—The decision in the earlier suit set aside finally by the appellate Court—Right of plaintiff to restore his suit which was dismissed—Nature of the application—If a review lies under Order* 47, *rule* 1, *Civil Procedure Code.*

Where a judgment or order is passed on the basis of some other judgment which has a bearing on the case, then when the basis of that order goes, the judgment also goes.

A filed a suit against *B* for an injunction restraining him from interfering with his possession of the suit property and it was dismissed by the trial Court. After the dismissal *B* filed another suit against *A* for recovery of possession of the same property. In the meantime *A's* suit was decreed in his favour by the appellate Court as a result of which *B's* suit was dismissed. Subsequently, however, in second appeal *A's* suit was finally dismissed and the appellate Court's decree was set aside. After succeeding in the second appeal *B* filed a petition under section 151, Civil Procedure Code, before the trial Court to reopen his case (which was dismissed on the basis of the appellate order in *A's* suit) and give a decree in his favour.

Held: in the circumstances the technicalities of procedure should not be allowed to stand in the way of the petitioner getting justice done in the Court below. The petition under section 151, Civil Procedure Code, is well founded in the circumstances of the case. Rules of procedure are not made for the purpose of hindering justice.

Quaere : Is a review under Order 47, rule 1, Civil Procedure Code, competent in the circumstances?

(1888) 13 Bom. 330, (1911) 33 All. 566, (1927) 5 Rang. 261, (1944) Nag. 379, and 66 L.W. 404 approved and followed.

(1922) 43 M.L.J. 33 doubted.

(1947) 2 M.L.J. 587 : (1948) M. 560 : 1949 Mad. 199 distinguished.

V. C. Viraraghavan for Petitioner.

V. S. Rangaswami Ayyangar for Respondent.

R.M. ——— *Petition allowed.*

Basheer Ahmed Sayeed, J. Subramania Naicker *v.* Sivasubramania Chettiar.
25th August, 1955. C.R.P. No. 137 of 1955.

Madras Buildings (Lease and Rent Rent Control) Act (XXV of 1949), *section* 7 (3) (*a*) (*iii*)—*Eviction of tenant of a non-residential building on the ground of landlord's own requirement—Landlord proposing or desirous of starting a business in future—If sufficient.*

The requirements of section 7 (3) (*a*) (iii) of the Madras Buildings (Lease and Rent Control) Act, 1949, that should be complied with before a landlord could seek to evict a tenant of a non-residential building for his own occupation are three : (1) the building should be a non-residential one, (2) the landlord should not be occupying a non-residential building which is his own or to the possession of which he might be entitled under the Act or otherwise and (3) the non-occupation of such a building must be in relation to a business which the landlord is carrying on. The intention of the legislature is to give the right to evict tenants only to such of the landlord as are actually carrying on business and who may require their own non-residential building in that connection and not to others who might have had a business or who might think of starting a future business.

(1949) 2 M.L.J. 138 distinguished.

The landlord should be actually carrying on business and if he feels inconvenient to carry on his business further without the use of his own premises, then he should resort to evict the tenant from another premises which belongs to him and which he requires for the purpose of carrying on that business. The question of *bona fides* is only an additional safeguard to avoid abuse of the right.

K. Sankara Sastri for Petitioner.

M. Natesan for Respondent.

R.M. ——— *Petition allowed.*

Ramaswami, J. Sitarama Reddiar *v.* Ayyaswami Gounder.
25th August, 1955. A.A.O. No. 417 of 1953.

Workmen's Compensation Act (VIII of 1923), *section* 2 (1) (*n*)—*'Workmen'—Who are—Employment of casual nature' and 'employment otherwise than for the employer's trade or business'—Meaning of.*

Whether an employment is of a 'casual nature' or not is a question of fact depending on the circumstances of the particular case. The word 'casual' as used

in the Act is not a term of precision and it seems to imply something midway between the regular employment of a workman and an engagement for a single day. It refers to the kind of service done by the employees rather than to the duration of the service.

Whether a person is employed 'for the purpose of the employer's trade or business' is to be decided also on the facts of each case and it does not turn on the question whether the premises in respect of which the work is done are used solely for business purposes or are used for domestic purposes also. But to constitute 'trade' or business there must be an exercise of an employment for the purpose of securing an advantage which may be estimated in money or money's worth, either for the person exercising the trade or business, or for others and in both cases it must be the occupation or one of the occupations in which the person is more or less permanently engaged.

(Case-law explained and reviewed.)

N. G. Krishna Ayyangar for Appellant.

A. R. Ramanathan and *C. Ramanathan* for Respondent.

R.M. ——— *Appeal dismissed.*

Govinda Menon & Ramaswami Gounder, JJ. Jambulinga Mudaliar *v.* Vadivelachari.
25th August, 1955. C.M.A. Nos. 80, 219 and 739 of 1952 and No. 84 of 1954.

Code of Civil Procedure (V of 1908), *section* 42 *and Madras Civil Courts Act* (III *of* 1873), *section* 13—*Execution of transferred decrees—High Court original side decree transmitted for execution to the Court of District Munsiff—Order in execution—Forum of appeal—If District Court or High Court.*

Whatever might be the rule of procedure applicable to execution proceedings on the original side of the High Court when a decree on the original side of the High Court is transferred to another Court in the city of Madras or to any other Court in the mofussil the rules governing the transmission are those contained in section 39, Civil Procedure Code.

The provision of law laying down the procedure for the execution of transferred decrees is contained in section 42, Civil Procedure Code. Order 21 of the Civil Procedure Code provides for execution of decrees in general and so far as execution of transferred decrees are concerned unless there is a special provision for it, a Court which has not passed the decree cannot execute it. Section 42 is such a special provision and the transferee Court is clothed with all the powers of the Court which passed the decree. The words 'as if it had been passed by itself' and the last sentence 'and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself' in section 42 make it clear that any order passed in execution of a transferred decree by a District Munsiff is appealable to the District Court as if the decree had been passed by the District Munsiff himself, even though the Court which passed the decree might be the District Court or the High Court.

7 M.H.C.R. 356 distinguished.

(1940) Bom. 633 referred and followed.

Section 13 of the Madras Civil Courts Act (III of 1873) only lays down a general provision regarding appeals from various Courts and that is applicable ordinarily to decrees or orders passed by certain Courts. Section 42, Civil Procedure Code, should be considered to be a special provision and applying the maxim *expressio unius est exclusio alterius* when a general provision is accompanied by a special provision it is the special provision that should govern a case.

N. R. Raghavachari for Appellant.

T. R. Sundaram for Respondent.

R.M. *Order set aside.*

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Rajamannar, C.J. and Rajagopala Ayyangar, J.
6th May, 1955.

In the matter of the Will of Ramchand Gurdasmal.
Diary No. 15008 of 1954 in O.P. No. 330 of 1954.

Court-fees Act (VII of 1870), *section* 19-I—*Court-fee payable on the probate of a will—Value of the estate—Computation of—If includes amounts already collected by the executor before the filing of the application.*

In an application for the probate of a will, court-fee has to be paid on the entire net value of the estate as at the date of the application, including the interest already collected by the executor before that date.

It is apparent that the framers of the Court-fees Act intended to introduce substantially the provisions regarding probate duties as they obtained in England under the Stamp Act of 1815, and the Customs and Inland Revenue Act, 1881. The decisions of the English Courts on the interpretation of those enactments could usefully be referred to for the construction of the corresponding Indian provision.

[Origin and History of the provision in the Court-fees Act and the corresponding English practice explained.]

Reading the affidavit of valuation, in the form prescribed, as a whole it is clear that the governing consideration for determining the court-fee payable on an application for the grant of probate of a will, is the value of the estate as at the date of the application.

Richards v. *Evans*, 10 Q.B.D. 174 : 116 E.R. 181.

Attorney-General v. *Partington*, 158 E.R. 964 (affirmed in *Partington* v. *Attorney-General*, L.R. 4 H. L. 100), *Winans* v. *Attorney-General*, 1910 A.C. 27, referred.

The improvement to the estate after the date of the death of the deceased and before the grant of the probate is inseparably part of that which the deceased had, and of which administration was granted. The interest accumulated or recovered is a strict accessory to the estate of the intestate. It does not make any difference that the executor has managed to collect a portion of the interest without obtaining the probate or letters of administration. The mere fact that an executor has been able to obtain payment of an interest which accrued to him after the date of the death of the deceased, it is not to be excluded from the computation of the value of the estate for the purpose of probate duty.

New York Brew.ry Co. v. *A.G.*, 1899 A.C. 62, referred.

M. Ranganatha Sastri and *M. V. Kapali Sastri* for Petitioner.

The Assistant Government Pleader (*K. Veeraswami*) for Respondent.

R.M. —— *Answer accordingly.*

Govinda Menon and Ramaswami, JJ.
5th August, 1955.

Venkatasubramaniam *v.* Vadasseri Tarwad.
Appeal No. 683 of 1950.

Transfer of Property Act (IV of 1882), *section* 61—*Mortgage with possession and lease back to the mortgagor—Suit for redemption of the mortgage—Mortgagee if could insist on the payment of not only the mortgage amount but the other sums due under the lease such as arrears of rent, etc., for the period during which the mortgagor was in possession.*

Whatever might have been the state of law prior to the amendment of section 61 of the Transfer of Property Act in 1929, the section as it stands does not compel a mortgagor to redeem all the mortgages on one and the same property at the same time. Hence even if there is a mortgage with possession and a lease back of the mortgaged properties to the mortgagor and a charge is created on the equity of redemption for arrears of rent, still the two transactions cannot be treated as one and the same compelling the mortgagor to redeem the same as such.

50 Mad. 180 : 52 M.L.J. 338 (P.C.) and 20 All. 401 held no longer good law.

It may be for certain purposes like Order 34, rule 14, Civil Procedure Code, the rent under such a lease deed may be considered to be a claim arising under the mortgage ; but that would not be enough to say that it is part of the same mortgage.

47 M.L.J. 798 ; 35 All. 48 ; 25 M.L.J. 561 ; 41 Mad. 1043 : 35 M.L.J. 414 ; (1940) 1 M.L.J. 143; (1952) 2 M.L.J. 675; (1954) 1 M.L.J. 507 and (1946) 2 M.L.J. 35, explained.

There is no justification for treating the rent as interest on the mortgage because it is fixed in a lease back of property comprised in an usufructuary mortgage. It is the intention of the parties and not the form of the instruments that should decide the nature of the contract between them.

A.I.R. 1952 Trav.-Co. 92, approved and followed.

It is clear that when a mortgagee brings a suit for sale of the mortgaged properties he has to claim all the amounts under separate mortgages. The same principle cannot be applied when a mortgagor brings a suit for redemption.

32 M.L.J. 317 ; 33 M.L.J. 581 ; 58 Mad. 75 : 67 M.L.J. 455 ; 40 Cal. 514 and 23 All. 313, referred.

(1940) 2 M.L.J. 760, followed.

T. R. Sangameswaran for Appellant.

N. Gopala Menon, T. K. Raman Nambisan and *K. S. Sankara Aiyar* for Respondents.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
19th August, 1955.

Alagammai Achi *v.* Veerappa Chettiar.
A.S. No. 599 of 1953.

Hindu Law—Joint family—Provision for marriage of the daughter of the family—Suit for—How to be provided for in the decree.

The daughter of a Hindu is entitled to be paid her marriage expenses out of her father's estate in the same way as she is entitled to be paid her maintenance. This right is based on her right to or interest in the joint family property and is not based on the natural obligation of the father and hence this obligation of the family property is not affected by partition between the father and his sons.

In cases the girl is ripe for marriage the proper course will be for the Court to fix a maximum amount for the marriage and to direct the defendant to deposit the money into Court and permit the plaintiff to draw without security the money or such part thereof as is actually required for the marriage, after notice to the other side. It is not correct to say that the marriage should be performed and the expenses actually incurred before the marriage expenses could be fixed or claimed or deposited. Nor is it proper that the amount fixed by Court should be paid to the plaintiff in cash at once.

19 M.L.J. 666 ; (1948) 1 M.L.J. 150, referred.

V. Seshadri and *K. S. Ramamurthi* for Appellant.

Alladi Kuppuswami for Respondent.

R.M. ——— *Appeal allowed in part.*

Rajagopala Ayyangar, J.
23rd August, 1955.

Braithwaite, Burn and Jessop Const. Co., *v.* Port of Madras.
C.S. No. 150 of 1955.

Copyright Act (*III of* 1914), *sections* 1 *and* 35 *and sections* 7, 9 *and* 12—*Copyright—What is and how protected—Plans—If could have copyright—Copyright in the plan of buildings—Extent of right protected—Damages for threatened infringement—If could be claimed.*

The principle of the law of copyright is that one man shall not be entitled to appropriate the fruits of another man's labour, skill or expenditure. The word 'original' in section 1 of the Copyright Act, 1914, does not mean that there should be any element of novelty in the work in respect of which copyright is claimed, but only that the work must not have been copied from another work and that it should originate from the author. Section 35 defines a literary work so as to include maps, charts, plans, tables and compilations. A plan, which is the result of expert knowledge and skill will be within the definition and there could be copyright in such a plan.

[*Obiter*.—A plan might more aptly fall within the definition of an artistic work.]

Though it is impossible to lay down any useful and complete test of what constitutes a copy or a colourable imitation of a copyright work, a copy is that which comes so near the original as to give to every person seeing it the idea created by the original. But a building or structure, as such, cannot infringe copyright and it is only the artistic character or design in a building that can be the subject of complaint under the copyright Act. Copyright does not extend to ideas or schemes or systems or methods and it is confined to their expression and if their expression is not copied the copyright is not infringed. Though the Copyright Act confers on the owner of a copyright the sole right to produce or reproduce the work in any material form whatsoever, still as regards plans of buildings or other construction, the location of a construction in the place indicated in a plan or the use of the construction for the purpose named in it is not a material reproduction of a plan so as to constitute it an infringement of the copyright in its owner.

Chabot v. *Davies*, (1936) 3 All E.R. 221, explained and doubted.

Meikle v. *Maufe*, (1941) 3 All E.R. 144, referred and followed.

(Scheme of sections 7, 9 and 12 of the Copyright Act analysed.)

Quaere :—In order to constitute an infringement of copyright in a literary work should the infringing copy itself be capable of being treated as a literary work ?

Though in normal cases of infringement the basis for the claim for damages for infringement is either loss of reputation due to vulgarisation or loss of profit by the infringer reaping the profits which legitimately ought to go to the owner of the copyright, it is not an answer to a complaint of infringement to say that because a particular drawing or plan is not suitable for others and that the plaintiffs could not have sold those plans to others, there could be no infringement in them.

In cases of threatened infringement of copyright a plaintiff would be entitled to a perpetual injunction against the defendant. But there cannot be claim for damages in addition or in the alternative in the case of a threatened invasion of a copyright as copyright is hardly the sickle wherewith to harvest damages for breach of a non-existing contract. Moreover as the copyright is in the plan or work as such and not in the specification or technical details which occupy them, any compensation of damages ought to exclude the cost of these factors.

O. T. G. Nambiar instructed by Messrs. King & Partridge for Plaintiffs.

The Advocate-General (*V. K. Thiruvenkatachari*), *V. V. Raghavan*, *A. R. Ramanathan* and *V. P. Raman* for Defendants.

R.M. ——— *Suit dismissed.*

Panchapakesa Ayyar, J. Kannappa Chettiar *v.* Ranganathan Chetti.
26th August, 1955. C.R.P. No. 1560 of 1954.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (*ii*) (*b*)—*'Used the building for a purpose other than that for which it was let'—Interpretation of—Premises taken for shroff's business—Used for manufacturing jewels—If amounts to a different user.*

As strictly construed in these parts a shroff's business consists in buying and selling gold, silver and other jewels manufactured by others and does not usually include the manufacture of such jewels by the shroff himself for purposes of sale. But in all such cases a liberal interpretation ought to be put in the interests of enterprise, and in order to prevent progress by too narrowly interpreting the scope of a business. If the business was totally different and such as could not have been contemplated at the time of the lease, it will certainly be a ground of eviction. But when a person carrying on business of shroff merely begins to manufacture jewels for sale in the premises, instead of confining himself to buying and selling jewels manufactured by others, it will still be within the frontiers of his original business.

V. T. Rangaswami Ayyangar and *T. E. Raghavachari* for Petitioner.

G. R. Jagadisan for Respondent.

R. M. *Petition dismissed.*

Krishnaswami Nayudu, J. Kesava Chettiar *v.* Periathambi Pillai.
26th August, 1955. S. A. No. 1608 of 1950.

Hindu Law—Partition—Joint family property—Nature of partition—Recurring right—Suit by alienee of a Hindu co-parcener for possession of his alienor's share of the joint family property—Limitation for—Limitation Act (IX of 1908), *Art.* 144*—Applicability—Code of Civil Procedure (V of* 1908), *O.* 9, *R.* 9*—Bar of suit under—If applicable to a suit for partition by an alienee.*

The right to partition of an alienee of a Hindu co-parcener's undivided share of the joint family property, is different from the right of the alienating coparcener himself. An alienee has no more than an equity against the interest of his alienor and he does not become a co-owner or one entitled to joint possession along with the non-alienating co-parceners. The right to partition arises out of joint ownership or a co-tenancy and in the absence of such a right the mere fact that the property is joint would not enable a person, who has no joint interest in the property to acquire a right to partition. It is this distinction that has to be borne in mind in order to ascertain the right of an alienee from a co-parcener.

The right to partition of an alienee of a coparcener is thus not a recurring right as it does not arise out of a right to partition. He has no absolute right to partition which is possessed by the alienating coparcener, but a right which is recognised on principles of equity. Hence where such an alienee has once exercised the cause of action arising in equity in an earlier suit and has failed to pursue it by reason of his default, he will be precluded from bringing a fresh suit under O. 9, R. 9, C. P. Code.

The right to enforce partition of such an alienee, not being a recurring right is governed by Art. 144 of the Limitation Act, if the property concerned is immoveable property. The time begins to run from the date when the alienee becomes entitled to possession by reason of the purchase as the possession of the non-alienating members of the family is not deemed to be on behalf of the alienee also.

M. S. Venkatarama Ayyar for Appellant.

T. V. Balakrishnan for Respondent.

R. M. *Appeal dismissed—No leave.*

Basheer Ahmed Sayeed, J. Dhanalakshmi Ammal *v* Corporation of Madras.
31st August, 1955. C.R.P. No. 2654 of 1952 and
C.R.P. No. 143 of 1953.

Madras City Tenants' Protection Act (III of 1922), *sections* 7, 7-*A and* 8 *—Scheme of—Fixation of reasonable rent—Circumstances that could be taken into consideration.*

The scheme of sections 7, 7-A and 8 of the Madras City Tenants' Protection Act is that (1) both the landlord and tenant can apply by means of a petition to the Court for enhancement of or for reduction of rent respectively, (2) such application is to be made to the Court having jurisdiction to entertain a suit for ejectment or to the Presidency Court of Small Causes, (3) the application by the landlord shall be for fixation of a reasonable rent, (4) the enhancement or reduction that may be ordered by the Court shall be whatever the Court deems reasonable. An overriding provision applicable to both the landlord and the tenant seems to be that the rent shall not be enhanced or reduced by more than two annas in the rupee upon the rent previously payable. The rent so fixed is not

subject to revision for a period of five years. The Court by its order is bound to fix the reasonable rent subject to the above limitation.

The Court which is called upon to fix what in its opinion is a reasonable rent is entitled to take into consideration all factors such as the fact that the present rent has been fixed several years ago and has not been increased for a long time though the rent of neighbouring properties has been increased. The Court can take judicial notice of the increase in the value of the properties since the time the original rent was fixed and the importance of the locality where the property is situate.

R. Tirumalai Thathachariar for Petitioner.

Messrs. John and Row for Respondent.

R.M. *Petition dismissed.*

Rajagopalan, J.
31st August, 1955.

Poongavanathachi *v.* Revenue Court, Kumbakonam.
W.P. No. 299 of 1955.

Tanjore Tenants and Pannaiyals' Protection Act (XIV of 1952), *section* 2 (*g*)—*'Landowner'—Coparcenery property—Minor coparcener's share—Tenancy agreement by* de facto *guardian—If tantamounts to a tenancy agreement with the landowner—Widow's right under Hindu Women's Right to Property Act—If affects the coparcener's right.*

Where the *de facto* guardian of a minor coparcener of a Hindu family executed a tenancy agreement with reference to the property of the family he would be a person deriving rights under the owner within the meaning of section 2 (*g*) of the Act. The fact that a widow of a coparcener exercised her right to a share of the property under the Hindu Women's Right to Property Act, does not in any way affect the tenancy agreement entered into on behalf of the minor coparcener as under the law the widow is not a coparcener and the ownership of the coparcenery property is not in any way affected by her claiming a share and the only consequence of the widow's exercise of her right to share is to suspend the full rights of the real owner for that period. The tenancy agreement entered into on behalf of the minor coparcener will still be valid even though the widow's share is determined separately.

(1953) 2 M.L.J. 459 and (1953) 2 M.L.J. 561, referred.

G. R. Jagadisan for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *R. Sundaralingam* for Respondent.

R.M. *Petition dismissed.*

Rajagopalan, J.
1st September, 1955.

Padmanabhan *v.* State of Madras.
W.P. No. 704 of 1954.

Motor Vehicles Act (IV of 1939), *sections* 47 *and* 68—*Rules framed thereunder—Rule* 160-*B—Validity—Duty to carry mails by the permit-holder as required by the transport authority as one of the conditions of the stage carriage permit—Validity—If within the rule making powers—When subject to judicial scrutiny.*

It is no doubt true that a stage carriage permit and the conditions imposed therein relate primarily to the interest of the travelling public for whose use the transport vehicle is intended. But the expression ' interest of the public generally ' as used in section 47 (1) (*a*) of the Motor Vehicles Act is comprehensive enough to cover the interest of the public generally, besides the interests of travelling public. Hence a condition in the route permit granted to the owner of a public passenger vehicle which requires the operator to carry mails at a stipulated rate is quite valid and germane to the Act.

Western Air Lines v. *Civil Aeronautics Board*, 98 L.Ed. 505 ; *Delta Air Lines* v. *Summer Field*, 98 L.Ed. 513 and *National Broadcasting Company* v. *U.S.*, 87 L.Ed. 1344, referred.

A.I.R. 1951 All. 257 dist. and expl.

Rule 160-B of the Motor Vehicles Rules made under section 68 of the Act is *intra vires* the powers of the State Government. Sub-section (2) of section 68 of the Act does not exhaust or otherwise limit or control the rule making powers of the Government under sub-section (1). Sub-section (2) only amounts to a statutory recognition that all the specific items mentioned therein are within the scope of the general powers conferred by sub-section (1).

Fitzwilliams Wentworth Estate v. *Minister for Housing and Local Government*, 1952 A.C. 362, referred.

The power to prescribe the rates at which mails should be carried is really ancillary to the power to require of a bus operator that he should carry mails. This power is within the ambit of the rule-making powers under section 68 (1) of the Act and arises by necessary implication.

Rule 160-B of the Motor Vehicles Rules is *intra vires* and valid and individual cases of application of that rule would however be subject to judicial review under Article 226 of the Constitution if that power is exercised on irrelevant consideration or is otherwise erroneously exercised.

T. Chengalvarayan for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) and the Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. *Petition dismissed.*

Rajagopalan, J.
2nd September, 1955.

Krishnamurthi *v.* National College Council, Tiruchi.
W. P. No. 463 of 1955.

Constitution of India (1950), *Art.* 226—*Scope of interference by Court under.*

An institution which is neither governed by any statutory provisions or entrusted with any statutory powers, even though it may be a society registered under the Societies Registration Act, will not be within the scope of the jurisdiction of the High Court under Article 226 of the Constitution of India.

Where the question involved in a dispute is essentially one of contract and where the contract itself specifically provides for a remedy, Article 226 of the Constitution could not be invoked.

R. Ramamurthi Aiyar for Petitioner.

K. Bashyam and *S. Varadachari* for Respondent.

R.M. *Petition dismissed.*

Rajagopalan, J.
2nd September, 1955.

Sengoda Goundar *v.* Collector of Coimbatore.
W.P. Nos. 473 and 475 of 1953.

Madras Irrigation Cess Act (*VII of* 1865), *section* 1 (1)—*Levy of penal water cess—Validity.*

It is no doubt true that the Madras Irrigation Cess Act does not in express terms authorise the levy of penal water cess. The Act only authorises the levy at the pleasure of the Government, a separate fee for the water taken and the Act authorises the Government to prescribe rules under which and the rates at which such fee namely, water-cess shall be levied. But the power to penalise irregular irrigation is incidental to the right and duty of the Government to regulate supply of water from Government sources of irrigation to ensure adequate supply of the available water for distribution to all those to whom the Government was bound to supply water. Such control and regulation of the supply of water is recognised by immemorial usage as the right and duty of the Government. The power to legislate on a given topic includes within its ambit a power to prescribe penalties for breaches of the statutory provisions.

The use of the expression 'fee' in section 1 (1) of the Act and the addition of section 1 (2) of the Act by the Amending Act III of 1945 does not in any way affect the power to levy enhanced or penal fee or water cess.

T. M. Krishnaswami Aiyar, A. M. Narayappar, T. Venkatadri and *K. Ramachandra Rao* for Petitioners.

The Advocate-General (*V. K. Tiruvenkatachari*), the Special Government Pleader (*V. V. Raghavan*) and *P. S. Kailasam* for Respondent.

R.M. ——— *Rule discharged.*

Rajagopalan, J. Manickam Pillai *v.* Akshayalingaswami Devasthanam.
5th September, 1955. W.P. Nos. 103 and 104 of 1955.

Practice—Statutory tribunal empowered to pass particular orders by the Statute itself—Failure to mention the statutory provision—If vitiates the order.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *section* 9 (4) (a)—*Power of tribunal to excuse delay—Scope of.*

If a power is exercised by a Statutory Tribunal and that power can be lawfully exercised and can be traced to the statutory power vested in that tribunal, the validity of the exercise of that power will have to be decided with reference to the specific statutory powers which the Statute vests in that Tribunal. The validity of the exercise of the jurisdiction cannot be challenged on the ground that the tribunal did not, in its order, refer specifically to the statutory provision.

On a reading of section 9 (4) (*a*) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, it is clear that it prescribes a period of two months within which an appeal should be preferred to the Tribunal and it also clothes the Tribunal with power to excuse the delay, if any, in presenting the appeal, that is to condone the delay in the presentation of the appeal which question could arise only after the lapse of the time prescribed by the law within which the appeal should be filed. That the expression ' condone the delay ' has not been expressly used in section 9 (4) (*a*) of the Act does not really affect the interpretation of the expression 'such further time as the Tribunal may in its discretion allow '. There is nothing in section 9 (4) (*a*) of the Act which limits its operation only to applications filed before the expiry of the period of two months.

Taking the scheme of section 9 of the Act as a whole the question of excusing the delay in filing an appeal is really between the tribunal and the applicant before it. When the Tribunal has exercised its discretion properly it is not open to the High Court to interfere with that discretion under Article 226 of the Constitution. Though the discretion vested in the Tribunal by section 9 (4) (*a*) of the Act is to be exercised in a judicial manner, it is not bound by all the restraints developed by case-law under section 5 of the Limitation Act.

T. S. Kuppuswami Aiyar for Petitioner.

R. Gopalaswami Ayyangar, T. M. Chinnayya Pillai and the Special Government Pleader (*V. V. Raghavan*) for Respondents.

R.M. ——— *Petitions dismissed.*

Ramaswami Gounder, J. Vaidyanatha Ayyar, *In re.*
6th September, 1955. Crl. Appeal No. 498 of 1954.

Indian Penal Code (XLV of 1860), *section* 161 *and Prevention of Corruption Act (II of* 1947), *section* 11—*Gratification—Acceptance of a loan by a public servant—If gratification.*

The meaning of the word ' gratification ' in section 161, Indian Penal Code, is not restricted to pecuniary gratification or gratification estimable in money. A gratification means something given to gain favour or as a recompense for anything done or to be done and in a bad sense, ' a bribe '. But the mere taking of a loan, with an obligation to repay it with interest, may not fall within the term ' gratification.'

It is true that a loan advanced to an officer—a public servant—in difficulties would give him gratification in the sense of pleasure or satisfaction but a loan is not a free gift of money as it carries with it the obligation to repay with interest.

I.L.R. (1950) All. 382, explained.

V. L. Ethiraj and *K. Venkataramani* for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for Respondent.

R.M. ——— *Conviction set aside.*

Rajamannar, C.J. & Panchapakesa Ayyar, J. Abdur Rahiman *v.* Avoomma.
7th September, 1955. R.C. No. 41 of 1954.

Muslim Personal Law Shariat (Madras Amendment Act) Act (XVIII of 1949)—*Validity—Constitution of India-Article* 19 (1) (*f*)—*If violated.*

The obvious object of the Madras (Act XVIII of 1949) to amend the Central Act, Muslim Personal Law (Shariat) Application Act (XXVI of 1937) is to extend the scope of the Central Act to agricultural lands as well within the State of Madras. The Shariat Act, including the Madras Amendment Act does not, nor purport to, abolish the rights and incidents of a Moplah Marummakatthayam tarwad. Section 2 of the Central Act and section 2 of the Madras Amendment Act, 1949, does not purport to make the Muslim Personal Law applicable to all matters relating to Muslims. Nor do they in terms totally abrogate custom and usage in respect of matters other than those enumerated in sections 2 and 3 of the Central Act and section 2 of the Local Act.

Observations in (1952) 2 M.L.J. 933 held wrong.

The scope of the Shariat Act, 1937, is limited and does not cover the entire field of property rights.

I.L.R. (1940) 2 Cal. 464, I.L.R. (1947) Bom. 1 and A.I.R. 1944 Lah. 121, referred.

The Madras Act (XVIII of 1949), amending the Central Act (XXVI of 1937) is not repugnant to Article 19 (1) (*f*) of the Constitution.

K. V. Venkatasubramania Aiyar and *A. Achuthan Nambiar* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for the State.

D. A. Krishna Variar for 1st Respondent.

R.M. ——— *Answer accordingly.*

Govinda Menon and Ramaswami Gounder, JJ. Public Prosecutor *v.* Kumaraswami Gounder.
12th September, 1955. Crl. Appeal No. 324 of 1952 & Crl. Rev. C. No. 227 of 1955.

Criminal Law—Appreciation of evidence—Minor discrepancies in the statements of witnesses —When and to what extent could vitiate the evidence.

Practice—Appeal against acquittal—Powers of High Court.

Code of Criminal Procedure (V of 1898), *section* 162—*Statements under—Necessity for recording on the spot.*

The powers of the High Court when dealing with an appeal against acquittal are the same as those which the High Court exercises in dealing with an appeal against a conviction. But the Court has to give a prominent consideration to such factors as the views of the Sessions Judge who has seen the witnesses in the box, the presumption of the innocence of the accused and other factors which have weighed with the lower Court in acquitting. If after taking these matters into consideration, if the appellate Court is convinced that on the evidence, the only conclusion that is possible is that the accused is guilty, then it will be justified in interfering with the acquittal.

It is common to find minor discrepancies in the evidence of truthful witnesses and on that account the testimony of such witnesses cannot be rejected. What has to be seen is whether the so-called discrepancy is one which would make the evidence of the witnesses so untruthful or so improbable that a Court of law would not be justified in accepting it at all. Truthful witnesses when subjected to strenuous cross-examination are likely to fall into traps and make statements which may, when compared with earlier statements be considered as contradictory. The task for a Court in the appraisal of the evidence is to find out whether the contradiction is such as to make the evidence untrustworthy or unacceptable.

Section 162 of the Code of Criminal Procedure and the rules of practice lay down that when a police officer questions a witness he has to record the replies given by the witness immediately without leaving it for being recorded at a later stage. It is highly irregular on the part of the police officer to question the witnesses and record their statements out of his own memory after reaching the police station.

R. Santhanam, Md. Khursheed Hussain and *Srimathi Padmini Raghavan* for Accused.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

R.M. ——— *Acquittal set aside.*

Balakrishna Ayyar, J. 31*st July*, 1952.

Ramachandra Spinning Mill *v.* Province of Madras. C.S. No. 448 of 1949.

Industrial Disputes Act (XIV of 1947), section 2 (1)—'Lockout'—What amounts to—Suit for a declaration that a Government Order referring an alleged industrial dispute for adjudication is null and void—If barred.

As the words of the definition 'lockout' in section 2 (1) of the Industrial Disputes Act, 1947, stand, if an employer closes the place of employment or suspends work on his premises a 'lockout' would come into existence, whatever be the circumstances in which the employer finds himself placed and whatever the strength of the agencies that forced on him the step and however impotent he may be to avoid the result, *e.g.*, a flood or fire destroying the factory.

The antithesis does not lie between an act of God and an act of human will. The antithesis to the word 'lockout' under the Act is to be found in the word 'strike'. When a number of employees abstain from work the test as to whether such abstention amounts to a strike or not would be found in the intention behind such abstention. There must be an understanding behind such abstention to constitute a strike. Even so if an employer shuts down his place of business as a means of reprisal or as an instrument of coercion or as a mode of exerting pressure on the employees, or, generally speaking, when his act is what may be called an act of belligerency there would be a lockout. If, on the other hand, he shuts down his work because he cannot for instance get the raw materials or the fuel, or the power necessary to carry on his undertaking, or because his credit is exhausted or because he is losing money, that would not be a lockout. In order to avoid a shut-down being called a lockout it is not necessary that the shut-down be permanent. The duration of the inability except as evidence of *bona fides* is not very relevant. The question for decision will be, was it a *bona fide* business decision or was it a move *vis-a-vis* the labours employed? The difficulty of deciding on which side of the line a particular case falls would not be a valid reason for refusing to recognise the existence of the line.

A suit for a declaration that a Government Order referring an alleged industrial dispute for adjudication is *ultra vires* and without jurisdiction is not barred under the Industrial Disputes Act.

C. Venugopalachari, D. Narasaraju and *A. N. Rangaswami* for Plaintiff.

Vepa P. Sarathy for the State Counsel.

R. Rajeswara Rao for Defendants.

R.M. —— *Suit decreed.*

Govinda Menon and Ramaswami, JJ. 19*th July*, 1955.

Kumbakonam Bank *v.* Shanmugham Pillai. Appeal No. 429 of 1950.

Hindu Law—Trading family—Liability of members for debts of joint family—Test to determine—Ancestral and new business—Scope of—Difference between trading families and non-trading family.

Per *Govinda Menon, J.*—"Under Hindu Law in case of business debts contracted by the father or manager of a joint family a distinction has to be drawn between families which thrive and depend solely and purely upon agriculture or the learned professions and those whose members are totally devoted to the calling of trade or commerce. In the latter case it cannot be said that if one of the members starts a business which may not be the same or identical with the original ancestral business, his sons cannot be made liable for the debts incurred by their father. It may be that a member of a money-lending family embarks upon a different kind of commercial transaction, for example, the starting of a spinning and weaving mill or some other industrial concern and if such a business is not a speculative one the sons will be liable for the debts incurred by their father. Heredity in business should be the touchstone and not the difference or novelty in the nature of the commercial undertaking. It is not right to extend the principles laid down in the Benares Bank Case (63 M.L.J. 92 (P.C.)) to trading families."

Per Ramaswami, J.—"The law relating to the powers of the member of a joint Hindu family to continue or extend or change or start a new business has become really well settled. In regard to the powers of a managing member there is, however, a marked distinction between a family whose hereditary avocation or *kulachara* is trade or commerce and a non-trading family. The limitation on the starting of a new business or extending or changing it when there are minors in the family or when the other adult members do not participate or acquiesce or benefit by it or it is not a necessity, is not applicable in the case of a hereditary trading family. In such a case the usage of the family is deemed to modify the ordinary rules relating to joint Hindu families so as to empower the managing member to start a new business either in place of the old or in addition to it. The distinction therefore in the case of such families between an ancestral and new business appears, so far as risk and liability are concerned, to be more formal than substantial".

Case-law reviewed. Mayne, 11th Edn., page 384, referred and approved.

C. A. Seshagiri Sastri for Appellant.

R. Ramamurthi Ayyar, R. Balaji Rao, K. Sundararajan and *T. S. Rangarajan* for Respondents.

R.M. —— *Appeal allowed.*

Rajagopala Ayyangar, J. Samudra Vijayam Chettiar *v.* Srinivasa Alwar.
25th August, 1955. C.R.P. No. 2647 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 2 (3) *and* (4)—*Landlord and tenant—Usufructuary mortgagee putting a tenant in possession—Mortgagor if bound by the tenancy—Election—Scope of.*

Usufructuary mortgagee in possession—Duty to deliver khas possession of the mortgaged property to the mortgagor on redemption—When absolved.

When a mortgagor puts a mortgagee in possession of a property under a usufructuary mortgage, the former has a right, when he has discharged the mortgage debt, to re-delivery of the possession of the property from the mortgagee. In cases where the mortgagee has introduced a tenant on the property, unless the tenant attorns to the mortgagor and the mortgagor is willing to accept the attornment of the tenancy, the liability of the mortgagee to deliver khas possession of the property and not merely such possession as is involved in a mere direction to the tenant to attorn to the mortgagor, continues and the mortgagor can hold the mortgagee liable for mesne profits.

But when once the mortgagor has taken proceedings against the tenant put in by the mortgagee, before the Rent Controller under the Madras Buildings (Lease and Rent Control) Act on the basis of recognising the tenancy he has elected his remedy and will be estopped from holding the mortgagee liable for delivery of possession or for mesne profits. The fact that the tenant in such a case has refused to attorn would not make any difference as it is the conduct of the mortgagor that matters and the attitude of the tenant is wholly irrelevant.

S. V. Venugopalachari and *S. Venkatesan* for Petitioner.

V. Devarajan for Respondent.

R.M. —— *Petition dismissed.*

Govinda Menon & Ramaswami Gounder, JJ. Mohd. Abdulla Sons *v.* Dorai Arasus.
1st September, 1955. C.R.P. No. 2597 of 1952.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 6—*Refund of excess rent paid on fixation of fair rent—Period of limitation applicable for actions for recovery of—Proviso limiting the recovery for a period of one year immediately before the determination of fair rent introduced by Amending Act of* 1951—*If applies to cases where fair rent has been fixed before the amendment.*

Before the amendment in 1951 which introduced the proviso to section 6 of the Madras Buildings (Lease and Rent Control) Act, 1949, limiting the quantum of recoverable excess rent to a period of one year back only, a tenant was entitled to claim the refund from 1st October, 1946, the date of the Act. A right which has accrued to a tenant before the amendment Act of 1951 cannot be taken away by the amendment. The mere fact that an appeal by the tenant was pending

against the order of the Rent Controller made prior to the amendment, and the amendment came into force during the pendency of the appeal, does not alter the position as the appellate order does not fix the fair rent afresh but only decides the controversy in the appeal and the order fixing the fair rent is the order of the Rent Controller.

The Article of the Limitation Act applicable to claims of refund of excess rent paid in such cases is Article 120 and not Article 62. When a tenant pays the agreed rent which proves to be in excess of the fair rent, the landlord had a right to receive it for his own use and such payment cannot in any sense be regarded as money received by the landlord for the tenant's use within the meaning of Article 62 of the Limitation Act.

(1955) 1 M.L.J. 345, differed from.

The true test in such case is to whom did the money rightfully belong at the time it was paid or received. Under the Rent Control Act it cannot be said that the landlord was not entitled to receive the agreed rate of rent at the time when it was paid to him though by the subsequent fixation of fair rent he became liable to refund part of it under the statute.

(The provision in section 3 as regards rent payable for building taken over by the Government contrasted with section 6).

S. Gopalaratnam and *P. N. Venugopalan* for Petitioners.

C. A. Vaidyalingam and *T. Venkatadri* for Respondent.

R.M. —————— *Revision allowed in part. Decree modified..*

Rajagopalan, J. Bhairava Iyer *v.* State of Madras.
5th September, 1955. W.P. No. 513 of 1955.

Constitution of India (1950), *Article* 226—*Delay in invoking the jurisdiction of the Court—When disentitles an applicant to relief.*

Though Article 226 of the Constitution of India does not by itself prescribe any period of limitation for an aggrieved party to invoke the jurisdiction of the High Court, it is well settled that the discretionary relief under Article 226 may not be granted if there has been undue delay in moving the Court. Whether the delay in a given case is such as should disentitle an applicant to the grant of the discretionary relief must necessarily be a question of fact to be decided with reference to the facts of that case.

The fact that the wrong caused by an illegal order is a continuing one does not entitle a petitioner to a writ *ex debito justitiae*, ignoring any delay in asking for such relief.

King v. *Stainforth Canal Co.*, 105 E.R. 12, referred.

The principle that an application for a writ of prohibition is never too late so long as there is something left for it to operate upon cannot be extended to writs of *certiorari*.

In re *The London, Etc., Building Society*, L.J.R. 1894 Q.B.D. 112 and A.I.R. 1954 Pepsu 133, explained.

R. M. Seshadri for Petitioner.

R.M. —————— *Petition dismissed.*

Krishnaswami Nayudu, J. Ganga Naicken *v.* Sundaram Ayyar.
8th September, 1955. C.R.P. No. 910 of 1954.

Madras Court-fees Act (*XIV of* 1955), *section* 87 (2)—*Scope of—Copy application in proceedings instituted before the new Act—If a proceeding before the commencement of the Act—Quantum of court-fees to be levied.*

A 'proceeding' may in some enactment mean an action or that which initiates an action and in other enactments it may also mean a step in an action. The meaning given to the word in any particular enactment cannot be taken as a safe guide in its application to other enactments. The meaning to be attributed to the word must depend upon the scope of the enactment and the particular context in which it occurs.

A copy application cannot ordinarily be considered to be a proceeding even in the sense of a step in an action. But in the context in which it appears in section

87 (2) of the Madras Court-fees Act, 1955, as it arises from a suit or proceeding it can come within the meaning of the word 'proceeding'.

Sub-section (2) of section 87 of the Madras Act XIV of 1955 saves all suits, and other proceedings from the Court-fee payable under the Act and every document connected with such a suit or proceeding has therefore to be regulated in the matter of Court-fees by the earlier Act and Rules. Everything connected with suits and proceedings instituted prior to the new Act and all proceedings by way of appeal or revision and all proceeedings in any manner arising from a suit or proceeding so instituted shall be governed or regulated only by the provisions of the earlier Act. This is so not only in respect of copy application for judgment and decrees in a suit or proceeding instituted before the new Act but also in respect of copy of judgment and decree in an appeal, revision or other proceeding instituted before or after such commencement, provided it relates to the suits and proceedings instituted before the commencement of the new Act.

Vakalats filed in Courts in respect of suits instituted before the commencement of the new Act, certified copies of documents such as decrees and judgments, etc., filed as enclosures to appeals and applications for copies of documents filed in suit or proceedings instituted before the commencement of the new Act, all these will be governed by the Act of 1870 and the Rules made thereunder and the Court-fee payable under that Act alone could be charged and not the new scale of fees under the present new Act.

The Government Pleader (*C. A. Vaidyalingam*) and *A. Palaniswami* for Petitioner.

K. Desikachari for Respondent.

R.M. ——— *Answer accordingly.*

Somasundaram, J. Chandukutti *v.* Padmavathi.
13th September, 1955. C.R.P. No. 146 of 1955.

Malabar Tenancy Act (XIV of 1930), *section* 25 (3) *as amended by Act (VII of* 1954)—*Application for amendment of a decree for eviction—Counter filed opposing the execution of the decree—If could be treated as an application for amendment of the decree for eviction under the Amending Act (VII of* 1954).

Under section 25 (3) of the Malabar Tenancy Amendment Act VII of 1954 an application for amendment of a decree for eviction should be filed in cases where the decree is passed prior to the amending Act, if the judgment-debtor desires to take advantage of the amendment. But where the defendant filed a counter in the execution application filed by the plaintiff and asked for the relief in the counter itself the counter can be treated as an application as it contains the essential prayer required for an application under section 25 (3) of the Amending Act. The fact that a separate application with necessary stamps was not filed is only an error in procedure and form and is an irregularity which can be cured by the Court in the exercise of its inherent jurisdiction.

I.L.R. 32 Mad. 242 ; 55 C.W.N. 402, referred.

A. Achuthan Nambiar for Petitioner.

V. P. Gopalan Nambiar for Respondent.

R.M. ——— *Petition allowed.*

Rajamannar, C.J. Varthaka Sahaya Nidhi *v.* Muthu Chetti.
15th September, 1955. C.R.P. No. 671 of 1954.

Code of Civil Procedure (V of 1908), *Order* 9, *rule* 13—*Application to set aside* ex parte *decree—Power of Court to direct the defendant to deposit the amount of suit claim.*

The words 'upon such terms as to costs' in Order 9, rule 13, Civil Procedure Code, would include any direction that may be given as regards costs, *viz.*, whether they should be paid into Court or they should be otherwise provided for. The subsequent words 'payment into Court or otherwise' cannot refer to costs. They can certainly refer to the amount of the suit claim.

A Court in setting aside an *ex parte* decree has therefore jurisdiction to direct the defendant to deposit into Court the amount of the suit claim.

A. Jagannatha Rao for Petitioner.

S. Ramachandra Aiyar and *K. Gopalaswami* for Respondent.

R.M. ——— *Petition dismissed.*

Ramaswami, J. Perumal Naicker *v.* Sithalakshmi.
31st August, 1955. A.A.O. No. 97 of 1953.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949), *section* 5 (*i*) (*c*) *—Desertion—Meaning of.*

From a consideration of the leading decisions on the subject both in England and in this country 'desertion' may be defined as the active or wilful termination of an existing state of cohabitation without the consent, express or implied of the party alleging desertion and against such party's wish. The party that voluntarily puts an end to such a state is said to desert. Abandonment or desertion must therefore be (*a*) wilful and deliberate (*b*) without consent, express or implied of the deserted party (*c*) against the wish of the party deserted and (*d*) without reasonable cause.

S. Ramachandra Aiyar for Appellant.

A. Nagarajan and *A. Viswanathan* for Respondents.

R.M. *Appeal dismissed.*

[FULL BENCH.]

Govinda Menon, Basheer Ahmed Sayeed and Ramaswmai, JJ. Sitarama Rao *v.* Venkatarama Reddiar.
8th September, 1955. Appeal No. 168 of 1949.

Minor—Executory contract entered into by guardian for necessity or benefit of the estate —Enforceability—General principle—Doctrine of mutuality if applicable in case minor is only a co-owner or tenant-in-common.

Majority: *Govinda Menon* and *Ramaswami JJ.*, (concurring).—In regard to agreements entered into on behalf of minors their validity and enforceability against the minor after he attains majority has to be viewed from various angles: (*a*) when the subject-matter of the transaction is the minor's separate property, an agreement by the guardian to sell the same cannot specifically be enforced against the minor after he attains majority. Conversely an agreement to purchase property for the minor, entered into by the guardian cannot likewise be specifically enforced by the minor on attaining majority. It is not within the competence of a manager of a minor's estate or of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase or for the sale of immoveable property and as there is no mutuality the minor is not bound by the contract and the minor cannot obtain specific performance of the contract. Nor is he liable to return the sum of money paid to his guardian as earnest money in respect of a contract of sale of mmoveable property since the amount can only be treated as having been paid as security for the performance of a contract which in law is no contract at all.

(*b*) Where the minor is a member of a joint Hindu family and the transaction is entered into by the manager on behalf of the family and if it is for purposes of necessity or benefit to the family then the contract could be specifically enforced even as regards the minor's share.

(*c*) The third category of cases is where the minor is interested in the property as a tenant-in-common with another and the contract is to bind both of them. In such cases the contract cannot be dissected and converted into component contracts, in one of which there is mutuality and not in the other. The doctrine of mutuality in the matter of contract entered into on behalf of a minor by a guardian can arise only in cases where the subject-matter of the contract is the minor's separate estate and specific performance of executory contracts in such cases is refused. But where the contract relates either to a joint family property or to property belonging to a minor and another as tenants-in-common then the doctrine of absence of mutuality cannot be applied as the contract is one and indivisible and mutuality exists between the co-owner or coparcener who is *sui juris* and the party with whom the contract is entered into.

39 Cal. 232 (P.C.) held good law.

(1948) 2 M.L.J. 22 : I.L.R. (1949) Mad. 141 (P.C.), explained.

Observations in (1950) 2 M.L.J. 597, held *obiter*.

A contract for sale of property being an essential preliminary to the sale itself its enforceability against the minor has to be judged by the same tests as are appli-

cable to the transfer of a ward's property by the guardian where it fructifies into a sale, which can be upheld on the basis of necessity or benefit to the minor's estate. In regard to contracts entered into for purchases of property on behalf of a minor a guardian of a minor is not at liberty to enter into such a contract and as no question of necessity or benefit could arise in such cases, such a contract cannot be enforced by the minor on his attaining majority. The doctrine of 'want of mutuality' in cases of contracts on behalf of minors' should be confined to cases of purchases of property and not in respect of agreements to sell. In essence and import the two kinds of contracts are distinct and different.

54 M.L.J. 412 ; (1938) 2 M.L.J. 277 ; (1946) 2 M.L.J. 103, held not good law.

Even in cases where a minor wishes to repudiate the contract he must repudiate the whole of it and not take the benefit under it. He will not be allowed to approbate and repprobate at the same time. He cannot repudiate the liability at the same time retaining to himself the advantage.

Case-law reviewed and discussed.

Basheer Ahmed Sayeed, J. (dissenting).—A document which is void against one, can certainly be enforced as against a person on whom it is valid and binding. From the mere fact that a person who is *sui juris* and who could enter into contracts by himself chooses also to involve a minor, on whose behalf he is not authorised to act, it cannot be claimed that the agreement so brought about by such a person, should be capable of being enforced, not merely against himself but also against the minor. What a person is not authorised to do on behalf of a minor acting solely for the minor, cannot be done by entering into a composite contract both for himelf and for the minor. The protection afforded to the minors and their interests cannot be defeated on the mere ground that a document is a composite one and is capable of being enforced against the major and minor at the same time. A contract which suffers for want of mutuality cannot be enforced against a minor. If such benefits are conferred upon him by any person so inclined, a minor will be entitled to retain the benefits conferred upon him, especially when such benefits are conferred in consideration of money belonging to the minor, the converse cannot be true, namely that obligations and liabilities could also be imposed upon the minor, especially when there is no legal guardian, and when there is no necessity nor benefit arising out of such obligations and responsibilities. The position of the minor becomes stronger in cases of what are known as executory contracts. Neither the minor could claim any benefit under such contracts, nor could such contracts be enforced against the minor on the principle of want of mutuality. The principle of mutuality holds good in respect of both classes of contracts, whether they be purchase of property on behalf of the minor or agreements to sell property on behalf of the minor. Simply because a transaction is ente ed into by a major on his own behalf and on behalf of a minor and because the transaction becomes an indivisible one, it cannot be said that the doctrine of mutuality is not applicable.

T. M. Krishnaswami Aiyar, R. Viswanathan and *T. S. Venkatarama Aiyar* for Appellant.

S. Thyagaraja Ayyar, T. R. Sundaram and *K. S. Champakesa Aiyangar* for Respondents.

R.M. ——— *Appeal dismissed.*

Govinda Menon and Ramaswami Gounder, JJ.
13th September, 1955.

Kamppanna Gounder *v.* Ponnuthayee.
A.A.A.O. No. 98 of 1952.

Limitation Act (IX of 1908), *section* 18 *and Civil Procedure Code, Order* 21, *rule* 90—*Extension of time for an application to set aside a sale under Order* 21, *rule* 90, *Civil Procedure Code—If could be granted under section* 18, *Limitation Act—Proof of fraud—Necessity.*

An application under Order 21, rule 90, Civil Procedure Code, to set aside a sale can be made on the ground of material irregularity or fraud in publishing or conducting it. The material irregularity or fraud must be one antecedent to the

sale. If the decree-holder himself becomes the purchaser and is guilty of fraud the application would come within the provisions of section 47 of the Code of Civil Procedure.

The question whether an application under Order 21, rule 90, Civil Procedure Code, to set aside a sale can be filed after the expiry of the thirty days from the date of the sale has to be decided from the standpoint as to who are the necessary parties to such an application. As the auction-purchaser, the sale in whose favour gets confirmed in the absence of any application to set aside the sale, is a person whose interest is affected by the setting aside of the sale, he is a necessary party to the proceedings whether added in the first instance or subsequently impleaded. In an application to set aside a sale, either before its confirmation or afterwards, the auction-purchaser must be heard and as such, he must be deemed to be a necessary party to the application.

Mulla's " Civil Procedure Code ", 12th Edn., p. 908, referred.

62 Cal. 286 ; 51 All. 910 and 11 Pat. 504, referred.

A judgment-debtor who is kept out of the knowledge of the execution sale by fraud, can, in an application under Order 21, rule 90, Civil Procedure Code, to set aside the sale, invoke the aid of section 18 of the Limitation Act, to extend the period of limitation where the fraud is proved to have been committed by the decree-holder or the auction-purchaser or both. It is true that fraud as contemplated under section 18 of the Limitation Act, must be fraud of the person against whom the suit or application is made and as both the auction-purchaser and the decree-holder are necessary parties to an application under Order 21, rule 90, Civil Procedure Code, for setting aside a sale, the fraud of one or the other would be sufficient to have the sale set aside.

(1950) 1 M.L.J. 432, differed.

(1950) 1 M.L.J. 471, approved.

A.I.R. 1949 Cal. 212, followed.

A.I.R. 1950 Cal. 520 and A.I.R. 1954 Cal. 604, doubted.

S. Ramachandra Ayyar for Appellant.

M. R. Narayanaswami Ayyar and *K. Thirumalai* for Respondent.

R.M. — *Appeal dismissed.*

Rajagopalan, J. Sha Bagojee Soanmull *v.* Asha Singh.
13th September, 1955. W.P. No. 2 of 1954.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 13—Exemption of a building from the operation of the Act—When could be challenged.

Where the action of the State Government under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, in exempting a building from the provisions of the said Act does not involve a question of policy or principle then that case would not be within the purview of section 13 of the Act though in a particular case the Government may even consider the decision of the Rent Controller and the Appellate Court to be wrong or unfair. If the action of the Government in exempting a premises is not in disregard of the underlying policy of the Rent Control Act, such an action cannot be questioned. But where either in form or in substance the order of the Government does not purport to reverse the order of the statutory Tribunals on the very same material placed before that Tribunal, there is nothing to vitiate the order. The fact that the order passed by the Government would be just in the circumstances would not by itself decide the issue of its validity.

Where there is no specific provision in the Act for the statutory Tribunal to grant relief to a person and such a relief cannot be sought, the Government will be within its jurisdiction in exercising the power vested in it under section 13 of the Act.

M. S. Venkatarama Aiyar and *S. Rangaswami Ayyangar* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) and *B. Lakkappa Rai* for Respondent.

R.M. — *Petition dismissed.*

Rajagopalan, J.
14th September, 1955.

Rajamani Transports *v.* Collector of Tiruchirapalli.
W.P. No. 955 of 1933.

Industrial Disputes—(Appellate Tribunal) Act (*XLVIII of* 1950), *section* 20 (2)—*Jurisdiction of Tribunal under—Scope and extent of—Tribunal if can interpret and supplement an award in cases of omissions—Money value of benefit—Scope of—Ascertainment of scales of wages—If permissible.*

When once an award has been made by a Tribunal under the Industrial Disputes Act, 1947 and the same has been made binding between the parties by publication in the Official Gazette the Tribunal can do nothing further with the award and i has no power to alter, modify, clarify or even interpret the award. Section 20 (2) of the Industrial Disputes Appellate Tribunal Act, 1950, does not in any way affect this principle. Under the said sub-section the Tribunal can only implement an award within the limits imposed by section 20 (2) of the said Act. In exercising the limited jurisdiction vested in it by the said sub-section it is not open to the Tribunal to interpret the award and decide on the basis of that interpretation that an award must be deemed to have meant something which is not explicitly stated. That would be a case of supplementing the award. Omissions in an award, deliberate or unintentional, cannot be rectified by recourse to section 20 (2) of the Appellate Tribunal Act, which empowers the Tribunal only to compute an existing benefit for which the award provides and not to discover a benefit by a process of interpretation, clarification or rectification of an award. An order of the Government under section 20 (1) of the Act based on such a report of the Tribunal, which it had no jurisdiction to make, is liable to be set aside under Article 226 of the Constitution.

Sub-section (2) of section 20 of the Appellate Tribunal Act speaks of "computation" and not merely "commutation" of a benefit. The expression "benefit" in the sub-section is wide enough to include within its ambit any benefit which has accrued to the worker and includes ascertainment of the scale of wages under the award and the quantum of the amount due on that basis. It is not restricted to the evaluation of a benefit other than a pecuniary benefit.

S. Venkatakrishnan and *V. Ramaswami* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. — *Rule made absolute.*

Rajagopala Ayyangar, J.
16th September, 1955.

Rahiman *v.* Collector of Customs, Madras.
W.P. No. 381 of 1953.

Constitution of India (1950), *Article* 226—*Jurisdiction of High Court—Order of a quasi-judicial authority liable to be quashed as one without jurisdiction—Party seeking remedy in the appellate forum as prescribed by the statute—If debarred from seeking relief in the High Court as against the original order.*

It is highly doubtful if the theory of the merger of an original order in an order of the appellate authority, which merely refuses to interfere, has any application to the orders of quasi-judicial tribunals, such as the Collector of Customs. If the order of the Collector of Customs is a nullity in that the procedure adopted was opposed to principles of natural justice, the mere fact that the aggrieved party filed an appeal to the Central Board of Revenue, which merely declined to interfere, is no bar to the exercise of the jurisdiction of the High Court under Article 226 of the Constitution to quash the order of the Collector of Customs. If the order passed by the Collector of Customs was one with jurisdiction, there might be some basis for the application of the theory of the order getting merged in the appellate order and it is the validity of the appellate order, in such cases, that may have to be canvassed.

V. C. Gopalaratnam and *L. V. Krishnaswami Ayyar* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*). for Respondent.

R.M. — *Order quashed.*

Rajamannar, C.J. and Panchapakesa Ayyar, J.
26th August, 1955.

Kodaikanal Motor Union, Ltd. *v.* Peer Mahomed Rowther.
W.A. No. 63 of 1955.

Motor Vehicles Act (IV of 1939), *sections* 47 *and* 57—*Representations made by interested persons under—Scope of—If the sole factor to be taken into consideration by the transport authorities—Representations by the general public—Propriety of taking into account in disposing of an aapplication for permit.*

It is clear that in disposing of an application for motor permit the Transport Authorities including the Government, could take into consideration matters other than those specifically mentioned in sections 47 and 57 of the Motor Vehicles Act. They can form an opinion on materials available from several sources, including representations from the public and the reports from their officers. Sections 47 and 57 of the Act provide for representations to be made by certain persons. Such representations when made should be taken into consideration. But that does not mean that in ascertaining whether a particular grant of permit is or is not in the interest of the public the transport authorities cannot take into consideration facts which may not be contained in the representations made by interested persons.

Though the language of sections 47 and 57 is general as regards the nature of the representations, what is contemplated by those sections are only representations opposing the grant or variance of a permit and not representations supporting an application for such grant.

Though certain representations made by the public may not be strictly in accordance with a notification issued under section 57 (3) in the sense that they were made before the issue of the notification, the facts contained in such representations can be made use of by the Transport Authorities or Government in arriving at a decision, though the persons who made such representations would not be entitled to have an opportunity of being heard in person or by representative. It is not necessary either that copies of such representations made under section 57 (3) should be furnished to the persons opposing the application for grant of permit.

T. Chengalvarayan and *R. M. Seshadri* for Appellant.

S. Mohan Kumaramangalam, the Special Government Pleader (*V. V. Raghavan*) and *N. R. Govindachari* for Respondents.

R.M. ——— *Appeal allowed.*

Krishnaswami Nayudu, J.
12th September, 1955.

Ardhanari Mudaliar *v.* Abdul Rahman.
S.A. Nos. 1434 and 1437 of 1951.

Mahomedan Law—Minority—Partition by de facto *guardian—Validity—Void or voidable.*

Transactions relating to immoveable property entered into on behalf of a Muhammaden minor, except by the legal guardian appointed by Court are void and the rigour of Mahomedan law in this respect is such that even transactions that have been acted upon and although the parties who claim benefits under them do not seek to have them set aside, but desire to affirm them by basing their cause of action on such documents, still the transaction cannot be upheld. Such transaction is void *in toto* not only *qua minors* but in regard to those even who were *sui juris.*

1952 S.C.R. 1133, followed.

62 M.L.J. 410 : L.R. 59 I.A. 92 : I.L.R. 7 Luck. 1 (P.C.) referred.

Whatever may be the position as regards a transaction which is voidable, a transaction relating to immoveable property, such as partition, entered into on behalf of a Mahomedan minor by any one except a legal guardian, is void and no question of ratification of such a document could arise and no rights could accrue therefrom and no Court could recognise or enforce any right under it at the instance of any party.

G. R. Jagadisan for Appellant.

T. K. Subramania Pillai for 1st Respondent.

R.M. ——— *Appeal allowed.*

Rajamannar, C.J. Murugan *v.* Sivaraman.
15th September, 1955. C.R.P. No. 1832 of 1953.

Civil Procedure Code (*V of* 1908), *Order* 33—*Application for permission to sue in* forma pauperis—*Failure to disclose certain insignificant assets—When a ground for dismissal of application—Factors to be considered whether suppression was deliberate and* mala fide.

It is not correct to say that an omission to mention even the most insignificant items of moveable properties must by itself lead to a dismissal of an application for leave to sue *in forma pauperis* under Order 33, Civil Procedure Code. The rule as to dismissal of such an application on the ground of suppression of assets must be confined to cases where the suppression is deliberate and not *bona fide.*

To find out whether an omission was deliberate and *mala fide*, one test is to ascertain whether the intention was to conceal the omitted item, because if that were included, the Court would find the petitioner had means to pay the Court-fee. But if the omitted item is small or insignificant compared with the quantum of Court-fee payable, it cannot be said that the omission was deliberate and *mala fide* for the obvious reason that even if he had mentioned it the petitioner could still have easily maintained that he was not in a position to pay the required Court-fee, and therefore, he was entitled to sue as a pauper. But a mere statement by the petitioner that the omitted item of property is of no value would not suffice.

(1942) 2 M.L.J. 345; (1945) 1 M.L.J. 52, referred to and explained.

(1954) 1 M.L.J. 26, followed.

K. Parasaran for Petitioner.

A. Shanmughavel for Respondent.

R.M. ——— *Petition allowed.*

Rajagopalan, J. Ramaian Udayar *v.* State of Madras.
15th September, 1955. W.P. Nos. 95 and 96 of 1954.

Madras Estates (*Rent Reduction*) *Act* (*XXX of* 1947)—*Powers of Estate Managers under—Whether can determine the question of tenure.*

The statutory powers of Estate Managers appointed under the Madras Estates Rent Reduction Act, 1947, is only to hold an enquiry and determine the rent that is payable on ryoti lands, that is, holdings in the possession of ryots. They have no statutory power either under the provisions of the Act or any rule framed thereunder to determine the question of tenure.

Decision in W.P. Nos. 561 and 564 of 1953, followed.

G. R. Jagadisan and *R. Ekambaram* for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for Respondent.

R.M. ——— *Order quashed.*

Rajagopalan, J. Nadimuthu Pillai *v.* Pattukottai Panchayat.
15th September, 1955. W.P. Nos. 63 and 64 of 1954.

Madras Village Panchayats Act (*X of* 1950)—*Taxation Rules—Rules* 9 (3), 18-*A and* 19—*Validity of—If could be questioned in writ proceedings—Section* 107 *of the Act if a bar to exercise of jurisdiction under Article* 226 *of the Constitution.*

The expression 'suit or legal proceedings' in section 107 (1) of the Madras Village Panchayats Act (X of 1950) does not cover proceedings instituted under Article 226 of the Constitution. Moreover the jurisdiction of the High Court under Article 226 of the Constitution cannot be curtailed or affected by any provision in a statute passed by a State Legislature.

Where in the exercise of their statutory authority vested in an executive Officer or Panchayat under the rules relating to assessment and collection of taxes, the authorities violate the principles of natural justice by not giving the assessee an effective opportunity to make his representation as regards the proposed enhancement of assessment, the order is vitiated and is liable to be quashed. The mere fact that another remedy by way of suit would be available to the aggrieved party is no bar to the High Court exercising its jurisdiction under Article 226 of the Constitution especially where a fundamental right to property is violated.

M. S. Venkatarama Aiyar for Petitioner.

P. S. Kailasam and *A. Palaniswami* for Respondent.

R.M. ——— *Rule made absolute.*

Rajagopalan, J. Saraswathi Bai *v.* Estate Abolition Tribunal.
16th September, 1955. W.P. No. 1017 of 1953.

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 12 (a) and (b)—Claim of land-holder to ryotwari pattas—Tests to decide—Poromboke lands vested in the land-holder—If land-holder entitled to ryotwari patta as a matter of right.

The right of a land-holder to issue of ryotwari patta in his favour in respect of any land in a quondam estate has to be determined in accordance with the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act of 1948, since the right to a ryotwari patta is itself a creature of that statute, which abolished the estate. Though it is true that the title to the poromboke lands within an estate is vested in the land-holder mere proprietary interest does not conclude the question whether the land-holder is entitled to the issue of a ryotwari patta in any of the lands so described. The description of a given piece of land as poromboke may not conclude the question. Though it is a relevant factor the evidentiary value of such a description is to be decided on the facts of each case. It is the use to which the land was put and not its name that should matter.

The right to a ryotwari patta has to be determined in accordance with the provisions of section 12 (*a*) and (*b*) (*iii*) of the Madras Act XXVI of 1948. Lands that fall within the scope of section 3 (16) (*a*) or (*b*) of the Madras Estates Land Act, 1908, are excluded from the ambit of section 12 (*a*) or 12 (*b*) (*iii*) of the Aboli ion Act, 1948. In deciding the question of issue of ryotwari patta lands comprehensively characterised as communal porombokes referred to in section 3 (16) (*a*) and section 3 (16) (*b*) of the Estates Land Act, are to be retained for the common use of the villagers.

In considering a claim for issue of ryotwari patta in respect of several pieces of lands in an estate the claim in regard to each is to be considered and discussed separately, though the general principles applicable to the claims could be dealt with by a common order.

(Tests to decide private lands—(1952) 1 M.L.J. 71, followed.)

(1945) 2 M.L.J. 352 and (1951) 1 M.L.J. 254, followed.

C. R. Krishna Rao for Petitioner.

The Special Government Pleader (*V. V. Raghavan*) for Respondent.

Rule made absolute :

R.M. *Directions for disposal afresh.*

Ramaswami, J. Kesava Chettiar *v.* Ramanatha Mudaliar.
16th September, 1955. A.A.O. No. 442 of 1953.

Limitation Act (IX of 1908), Article 85—Applicability—Mutuality of account—When established.

In order that an account between the parties might be mutual so as to attract the period of limitation under Article 85 of the Limitation Act, there must be transactions on each side, creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. A shifting balance is not *per se* a conclucive test of mutuality and though it may be an important test of mutuality its absence is not a conclusive proof against mutuality.

Where the plaintiff, a wholesale dealer in yarn supplied yarn to the defendant and the defendant paid for the same and also advanced moneys for procuring a continuous supply due to the State control of yarn, though such an account might be an open and current account, it is not mutual as the advances by the defendant do not create independent obligations but are only payments to ensure the performance of reciprocal obligations by the plaintiff to supply yarn.

D. Ramaswami Aiyangar and *P. R. Varadarajan* for Appellant.

S. V. Venugopalachari for Respondent.

R.M. *Appeal dismissed : Leave granted.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
22nd September, 1955.

Kumaraswami Mudaliar *v.* Alamelu Ammal.
S.A. No. 486 of 1951.

Deed—Construction—Tamil expression 'aan varsugal'—If confined to literal sense of 'male heirs.'

The Tamil expression 'aan varsugal' is not restricted to mean in the literal sense of 'male heirs' but can also mean 'male descendants' according to the intention of the testator and special circumstances of the case.

K. S. Naidu for Appellant.

M. S. Venkatarama Aiyar and *R. Rangachari* for Respondents.

R.M. ———— *Appeal dismissed.*

Krishnaswami Nayudu, J.
23rd September, 1955.

Thayammal *v.* Adhimoolam Servai.
S.A. No. 1776 of 1951.

Transfer of Property Act (IV of 1882), section 91 (a)—Redemption of mortgage—Right of—'Any person'—If would include a person having only a contingent interest in the mortgaged property.

Section 91 (*a*) of the Transfer of Property Act confers a right of redemption of a mortgage on any person having any interest in the property subject to the mortgage. *Prima facie* such a person is expected to have a present and subsisting interest in the property and not a mere contingent interest which may or may not materialise. The meaning of the word 'interest' in the section does not include the chance of inheritance of a reversionary heir.

To exercise a right to redemption it is not, however, necessary that a person having a vested right in the property should also be entitled to an immediate right to possession and enjoyment. It is sufficient if it is shown that he has a vested right in the property, though the right to possession is postponed.

A reversioner has a right to restrain waste if circumstances require his interference and to secure the property against being lost to the reversioner, it might be open to him to sue for redemption. But on that account he would not come within the meaning of a person having an interest in the mortgaged property entitling him to sue for redemption, his right not being transferable or heritable but being only *spes successionis.*

41 M.L.J. 163 : I.L.R. 44 Mad. 951, differed.

Sundararajan and *Sivaswami* for Appellant.

R. Aravamuda Aiyangar for 1st Respondent.

R.M. ———— *Appeal dismissed : No leave.*

Govinda Menon and Basheer Ahmed Sayeed, JJ.
28th September, 1955.

Maruda Muthu *v.* Narayanaswami.
S.A. No. 1610 of 1955.

Land Tenure—Custom—Purakudi tenants in Tanjore District—If entitled to compensation before eviction—Proof of custom to that effect.

When once the title of a landlord is proved and a terminable tenancy is admitted or proved, the onus of showing that the tenant should be paid the value of improvements before eviction is on him.

In the Districts of Malabar and South Kanara apart from any statutory provision, the customary law prevailed that a tenant should be paid compensation for improvements before ejectment. In the District of Tanjore 'purakudi' and 'kasavargam' tenure are the same and there is no distinction between the two classes of tenants. In the case of kasavargamdar it is settled that at the time of his ejectment he is to be paid the value of the house erected by him or the holding, though the tenancy is terminable and he is liable to be ejected.

I.L.R. 27 Mad. 517, followed.

Hence purakudi tenants are also similarly entitled to compensation for the value of house built by them.

S. Ramachandra Aiyar for Appellant.

S. Tyagaraja Aiyar for Respondents.

R.M. ———— *Decree modified.*

Panchapakesa Ayyar, J. Seth Mohandoss *v.* Ramamoorthy.
26th August, 1955. C.R.P. No. 787 of 1954.

Execution sale—Successful bidder at auction—If could transfer his rights and pray for issue of sale certificate in the name of the transferee—Money paid into Court in pursuance of a joint memo. presumably under directions of Court—Right to refund.

A transferee from an auction-purchaser, successful bidder in a Court auction sale, is not entitled to the issue of a sale certificate in his favour directly from the Court unless it is proved that the bidding by the successful bidder was done for or on his behalf. It is open to such a transferee to take a regular sale deed from the auction purchaser bidder after the issue of sale certificate in his favour ; but the Court would not issue the sale certificate in the name of the transferee from a successful auction bidder in execution sale, so long as the transferee was not the patent or latent bidder. It makes no difference that both the transferee and auction-purchaser bidder have filed a joint consent memo. praying for the issue of the sale certificate. It may be that in certain cases where the Court has issued the sale certificate in the name of a transferee it may be only an irregularity and not an illegality. But no Court is bound to commit an irregularity at the request of the party, even by consent.

A.I.R. 1938 All. 471 ; 68 L.W. 441 ; 1952 A.L.J. 106, referred and explained.

Where, apparently in pursuance of even an implied direction of Court the transferee has paid the money into Court, on a wrong assumption that the Court has jurisdiction to issue the sale certificate in his favour and the Court finally dismisses the application as not maintainable it is the duty of the Court to direct the refund of the money so paid, to the transferee. There is no necessity for any specific prayer for the refund of the amount by the transferee applicant.

N. Ramanatha Aiyar for Petitioner.

A. Sundaram Aiyar and *C. S. Rama Rao Sahib* for Respondent.

R.M. ——— *Petition dismissed.*

Ramaswami, J. Easoop *v.* Bookutty.
13th September, 1955. A.A.O. No. 29 of 1953.

Madras Agriculturists Relief Act (IV of 1938), *sections* 9-*A and* 19-*A—Procedure under—Scope of.*

On a plain reading of the provisions of section 19-A of the Madras Agriculturists Relief Act, 1938, it is clear that a mortgage debt within the scope of section 9-A of the Act is not as such excluded from its operation. There is nothing to show that section 9-A of the Act is an overriding or self-contained provision having no relation to the procedure laid down in section 19-A for enforcing the rights of agriculturists.

So long as a mortgage debt is not outside the scope of section 19-A an application to scale down a mortgage debt as per the provisions of section 9-A is maintainable under section 19-A to obtain a declaration under it. It is not therefore correct to say that the rights under section 9-A of the Act could be agitated only in a suit for redemption.

But it is no doubt true that any further remedy, apart from the declaration under section 19-A, which the mortgagor might claim as and by way of recovery of possession or otherwise, could be had only in a suit and not in a proceeding under section 19-A.

Case-law reviewed.

C.K. Viswanatha Aiyar for Appellant.

V. Balakrishna Eradi for Respondent.

R.M. ——— *Appeal dismissed.*

Ramaswami, J. Arunachalam Chettiar *v.* Meyammai Achi.
20th September, 1955. A.A.O. No. 406 of 1954.

Code of Civil Procedure (V of 1908), *section* 48—*Limitation for execution of decree—Extended period in cases of fraud of judgment-debtor in preventing execution—Scope of—Fraud—What amounts to.*

Under section 48 of the Code of Civil Procedure a decree might be executed even after the expiry of the period of twelve years laid down therein, if it is proved that there was fraud on the part of the judgment-debtor at any stage of the execution earlier, which prevented the decree-holder from executing the decree. Such fraud by the judgment-debtor gives a fresh period of twelve years within which the

decree might be executed. This is avaiable not only against the judgment-debtor but also against his legal representatives.

The term "fraud' in this section is to be interpreted in a liberal sense. Any improper means resorted to by the judgment-debtor to prevent execution, such as wilful evasion of arrest, frivolous and futile objections—dishonest upon the face of it —deliberately adopted by the judgment-debtor, concealing property or denying its ownership, putting forward a benamidar as owner, keeping out of jurisdiction, etc., will all amount to fraud within the meaning of the section. The term includes not only deceit but also circumvention.

It is also not necessary on the part of the decree-holder to prove that the fraud was such that continued to prevent execution up to the expiry of the period of twelve years and that he was cautiously diligent during all the time.

Case-law reviewed.

K. Parasaran for Appellant.

T. S. Vaidyanatha Ayyar for Respondent.

R.M. ——— *Appeal dismissed.*

Rajagopala Ayyangar, J. Abdul Rahim & Bros. *v.* R. K. Selvam Bros.
6th October, 1955. C.R.P. No. 82 of 1953.

Madras Buildings (Lease and Rent) Control Act (XXV of 1949), *section* 7 (2) (v)—*Eviction of tenant—Ceasing to occupy a building without reasonable cause—What amounts to.*

In order to sustain an application for eviction of a tenant under section 7 (2) (*v*) of the Madras Act XXV of 1949 two conditions must be satisfied : (1) that the tenant has ceased to occupy the building for a continuous period of four months and (2) that there was no reasonable cause for the same. Where the tenant in occupation has left his furniture in the premises, it is sufficient occupation within the meaning of the section. The Act does not require that the tenant in occupation of a non-residential building should carry on actual business in the premises in order to prevent eviction. Where due to the enforcement of Prohibition Law, the tenant, a dealer in liquor is not able to carry on his business in the premises but keeps his furniture and pays the rents he is not liable to be evicted on the ground that he has ceased to occupy the premises.

M. S. Venkatarama Aiyar and *M. S. Mahadeva Aiyar* for Petitioner.

V. N. Srinivasa Rao and *C. S. Rajappa* for Respondent.

R.M. ——— *Petition dismissed.*

Rajagopala Aiyangar, J. Thangavelu Chettiar *v.* Commissioner of Police.
7th October, 1955. W.P. No 783 of 1955.

Madras City Police Act (III of 1888), *section* 76—*If exhaustive of the power of the Commissioner to cancel licence.*

Lodging house—Licence to run—Conditions of licence—Violation of—What amounts to —Use of a house as a brothel—If amounts to disorderly conduct.

Section 76 of the Madras City Police Act is not the sole or exclusive source of power authorising the Commissioner of Police to cancel a licence g anted under the Act for running a lodging house. A licence is granted to carry on business within the law and if the law is transgressed in the manner of running the business, it is the inherent right of the authority granting the licence or supervising it to cancel it. It is not necessary that the licensee should first be convic ed by a magistrate for breach of the conditions of licence, before the Commissioner could cancel the licence.

(That the language of section 76 of the Act and the conditions of licence require revision pointed out).

The condition in the licence which renders the ' permitting of any disorderly conduct' on the premises a ground for cancelling the licence is wide enough to include cases where the premises is used or permitted to be used as a brothel house. Disorder in this context does not mean that there should be rioting or affray.

" Permit " in the context does not mean that the licensee should be present on the premises and actively direct the acts prohibited by the conditions of licence. Where there is sufficient connection between the licensee and the person in charge of the premises as to impute to the former knowledge of what was going on, it cannot be said that the licensee did not " permit " any of the prohibited acts, even

though he had left the management to another. The running of a brothel is not a use of property guaranteed by the Constitution nor is it a business, the right to carry on which, is guaranteed by Part III of the Constitution.

R. M. Seshadri and *V. Srinivasan* for Petitioner.

R.M. ——— *Petition dismissed.*

[FULL BENCH]

Rajamannar, C.J., Panchapakesa Ayyar and Rajagopala Ayyangar, JJ.
7th October, 1955.

Board of Revenue *v.* Moideen Rowther.
R.C. No. 79 of 1954.

Indian Stamp Act (II of 1899), *section* 33—*Action under—Suit for partition—Parties not furnishing the requisite stamps—Court if has power to draw up a decree on plain paper or on insufficient stamp and send the same to the Collector for impounding and levy of penalty —Civil Rules of Practice—Rule* 12 (3)—*Validity.*

A final decree for partition passed by a civil Court is an instrument of partition as defined in section 2 (15) of the Stamp Act. It follows that such a decree can only be engrossed on stamp papers of sufficient value and till then it has no existence as a decree.

I.L.R. 32 Cal. 483 and A.I.R. 1938 Mad. 307 referred.

But in a suit for partition, on the failure of the parties to furnish the requisite stamps the Court has no power to draw up a decree for partition. In such a case the Court can certainly refuse to draw up the final decree and sign it. But if the parties choose to take that risk and do not furnish the stamp papers the Court has no power to draw up a decree on unstamped paper and sign it. The Court is precluded from drawing up a final decree for partition on unstamped paper and if it is so drawn up the Court is obviously doing a wrong thing. It may be open to the parties to approach the Court for a final decree at any time after supplying the necessary stamp papers.

(1946) 1 M.L.J. 464, referred.

It is too much of a strain on the language of section 33 (1) of the Stamp Act to say that such a decree which the Court draws up and signs, knowing that it is not duly stamped, "comes before it in the performance of its functions" and "appears to the Judge to be not duly stamped."

Rule 12 (3) of the Civil Rules of Practice is *ultra vires* and in the absence of an express provision in the Stamp Act which enables a Court to adopt the procedure indicated in the said rule, a Court cannot make a party liable to stamp duty and penalty for omission to furnish stamp papers to enable the Court to draw up a valid decree for partition.

The Government Pleader (*C. A. Vaidialingam*) for Petitioner.

R. Sitaraman and *M. R. Krishnan* for Respondent.

R.M. ——— *Reference answered accordingly.*

Somasundaram, J.
7th October, 1955.

Sundaresa Iyer, *In re*
Crl. Rev. Case No. 692 of 1955.
(Crl. Rev. Pet. No. 652 of 1955).

Madras District Municipalities Act (V of 1920), *section* 353-*A—Protection under—Sanction before prosecution—If available to persons other than those specifically mentioned.*

It is true that servants of a Municipality when they act under the delegated powers under section 18-A (*iii*) of the Madras District Municipalities Act have all the powers of the executive authority. But a mere clothing of an individual with all the powers of a higher authority will not make that individual the higher authority.

Therefore in section 353-A of the Madras District Municipalities Act the executive officer means only the executive authority of a Municipality and the protection of previous sanction of the Government is afforded only to the persons mentioned in that section and it does not extend to the persons to whom the powers are delegated by such persons. Sections 356 and 353-A contrasted.

G. Gopalaswami and *V. Gopinathan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. ——— *Petition dismissed.*

Rajamannar, C.J.
7th October, 1955.

The Madras Provincial Type Foundry Workers Union *v.* Ramalinga Mudaliar.
C.R.P. Nos. 1835 to 1838 of 1953.

Payment of Wages Act (*IV of* 1936), *section* 15 (3) *and section* 17—*Scope of—Appeal—If would lie from the rejection of an application by Commissioner without going into the merits.*

An appeal under section 17 of the Payment of Wages Act lies to the Court of Small Causes in the Presidency Towns or to the District Court elsewhere, only against a direction under section 15 (3) or (4) of the Act. It cannot be said that merely because an application made by an employed person is taken on file or numbered it has been legally entertained. The right of appeal arises only if the authority enters into the merits of an application and holds either in favour of the employer or employee. Where an application is dismissed by the Commissioner on the ground that the subject-matter of a claim by an employed person would not fall within the Act, *viz.*, that it would not fall within the definition of wages in section 2 (*vi*) of the Act, there is no adjudication on the merits of the case, and no appeal lies from such an order under section 17.

A.I.R. 1955 Bom. 75 followed.

Quaere : Does an employee get a right of appeal only where the Commissioner issues a positive direction to the employer and if the employee's petition is totally rejected on the merits is he not entitled to appeal?

A.I.R. 1952 Cal. 928; A.I.R. 1955 All. 180, doubted.

B. R. Dolia and *Narayanan* for Petitioner.

N. Ramanatha Aiyar for Respondent.

R.M. *Petition dismissed.*

Rajagopalan, J.
12th October, 1955.

Trichinopoly Mills *v.* Swaminathan.
W.P. Nos. 136 to 139 of 1954.

Payments of Wages Act (*IV of* 1936), *sections* 2 (*vi*) *and* 15—*Jurisdiction of Commissioner under—When could be invoked—Claim for wages during lay-off period—If could be decided.*

Industrial Employment Standing Orders Act (*XX of* 1946), *section* 2 (*i*)—'*Workmen*'—*Interpretation of.*

Constitution of India, Article 226—*Finding of fact on a jurisdictional issue—Interference by the High Court.*

The Commissioner for Workmen's Compensation has jurisdiction under section 15 of the Payment of Wages Act to inquire into a claim, only if the claim relates to wages as defined by section 2 (*vi*) of the Act. The claim should relate to remuneration in terms of money which would be payable if the terms of the contract of employment were fulfilled. If a finding on what might be called a jurisdictional fact is challenged, it is open to the High Court to review the correctness of the finding under Article 226 of the Constitution.

A claim for wages by a workman during a period of lay-off in an industrial establishment due to power cut would have to be decided on the construction of the Standing Orders framed and certified for that establishment under the Industrial Employment Standing Orders Act (XX of 1946). That some of the Standing Orders were not enforced against the employees in the past would not make the Standing Orders any the less applicable. If the employees were 'workmen' as defined in section 2 (*i*) of Act XX of 1946, which includes clerks within the category of 'workmen' the Standing Orders would appy to them.

Fo a period of lay-off by authorised stoppage of work and during a period of lay-off which an employer orders in accordance with law, no wages as such is due to the workmen. Hence where the claim of the workmen relates to the money due to them for the period of a lay-off, which was authorised by the Standing Orders binding between the parties, the Commissioner has no jurisdiction to entertain the claim under section 15 of the Payment of Wages Act.

A. V. Narayanaswami Ayyar and *R. Venkatachalam* for Petitioners.

The Special Government Pleader (*V. V. Raghavan*), *R. Desikan* and *A. Arunachalam* for Respondents.

R.M. *Rules made absolute.*

and even if some of the terms of an alleged compromise are in dispute, it cannot be recorded by Court as there is no adjustment within the meaning of Order 23, rule 3, Civil Procedure Code.

In cases of dispute such as whether an alleged compromise is true and complete, the conclusion of the trial Court as to what happened in Court is of prime importance and not any logical deductions and inferences by an appellate Court. It is a mixed question of law and fact and involves question of jurisdiction and the High Court can interfere in revision under section 115, Civil Procedure Code.

V. S. Rangaswami Aiyangar for Petitioners.

M. R. Narayanaswami Aiyar for Respondents.

R.M. —— *Petition allowed.*

Somasundaram and Ramaswami Gounder, JJ. Thottan, *In re.*
10*th October*, 1955. R.T. No. 60 of 1955 and Crl.A. No. 476 of 1955.

Code of Criminal Procedure (V of 1898), *sections* 164 *and* 342—*Confessions of accused not conforming to section* 164—*Admissibility*—*Questions put to an accused under section* 342—*Object and form of.*

No confession recorded by a magistrate of any rank, without conforming to the provisions prescribed by sections 164 of the Code of Criminal Procedure, is admissible in evidence.

(1936) M.W.N. (Cr.) 141 (P.C.), followed.

(1952) M.W.N. 252 (Cr.), differed.

The object of the examination of an accused under section 342 of Criminal Procedure Code is to give him an opportunity to explain the circumstances against him. The Judge who examines an accused under that section should therefore frame simple separate questions for each one of the circumstances relied on by the Judge and they must be put separately to the accused so that he could be in a position to understand them and explain. Framing one long question with several sub-clauses covering all the points will only baffle the accused and he will not be able to answer the question.

T. V. Bava for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. —— *Appeal dismissed.*

Panchapakesa Aiyar, J. Pathinen Grama Arya Vaisya Bank, Ltd. *v.* Nagaswami Chettiar.
14*th October*, 1955. C.R.P. No. 1208 of 1951.

Provincial Insolvency Act (V of 1920), *section* 9 (1) (*c*) *as amended by Act III of* 1950—*If retrospective.*

The proviso added to section 9 (1) (*c*) of the Provincial Insolvency Act by the amending Act III of 1950, which provides for an extended period for filing of an insolvency petition in cases where the period of three months fixed by the statute expires when the Court is closed, is neither made retrospective nor applicable to pending proceedings. Under the law as it stood before the amendment in 1950, an application for adjudication must be filed peremptorily within a period of three months of the alleged act of insolvency. It was not a period of limitation but a condition precedent to adjudication and on the expiry of the three months period the transaction ceases to be impeachable under the Insolvency Act and therefore ceases to be an act of insolvency, irrespective of the merits.

69 M.L.J. 283 : I.L.R. 58 Mad. 794 referred.

It made no difference to this rule whether the three months period expired when the Court was closed. The proviso added by the amending Act of 1950 will be available only to cases that arose from that date and not to pending proceedings.

C.R.P. No. 586 of 1953 followed.

K. S. Sankara Ayyar for Petitioner.

K. S. Ramamurti, K. Vaithiswaran, G. R. Jagadisan and *N. K. Ramaswami* for Respondents.

R.M. —— *Petition dismissed.*

Govinda Menon and Ramaswami Gounder, JJ. Neelambal *v.* Rajarathnam.
6th September, 1955. S.A. No. 795 of 1951.

Hindu Law—Widow—Right to sell property for future maintenance—Scope of.

The principle of law is well established that a Hindu widow can alienate her husband's property for necessity of the estate. But no hard and fast rule can be laid down as to whether a Hindu widow in possession of very little property left by her husband can or cannot sell the same for her future maintenance. Each case has to be decided on its own facts. Generally speaking there is no obligation upon a Hindu widow to starve herself and keep a small estate for the benefit of the reversioners, living on a meagre income. If the circumstances of the case warrants, it will be perfectly legitimate for her to sell her husband's property, if it is very small and does not yield sufficient income, even for her future maintenance.

A.I.R. 1926 Mad. 1122 ; 50 M.L.J. 234 : A.I.R. 1926 Mad. 464, Approved.
A.I.R. 1943 Bom. 266 ; (1952) 2 M.L.J. 679, Differed.

P. S. Kailasam for Appellant.

T.K. Subramania Pillai for Respondent.

R.M. *Appeal allowed.*

Somasundaram, J. Palaniswami Nadar *v.*
29th September, 1955. Mathurai Veeraswami Nadar.
C.R.P. No. 519 of 1955.

Code of Civil Procedure (V of 1908), section 151—Scope of—Court appointing each of the parties to a suit as receivers in respect of certain items—If final—Power of Court to change the items for a more efficient management of the estate—If amounts to variation of the order—If could be done under inherent jurisdiction.

An order of appointment of a receiver in a suit does not determine the rights of parties to the suit and it only means the management of the affairs by the Court on behalf of the parties till the disposal of the suit. The property is in *custodia legis* and the receiver is an agent of Court and the Court has ample powers to give him directions as to the administration.

Any alteration in the original order of appointment of receiver cannot therefore be said to affect the rights of parties, and is only in the nature of directions for the efficient administration of the property in the custody of the Court and is well within the inherent jurisdiction of the Court under section 151, Civil Procedure Code. It cannot be said that the original order of appointment is final between the parties and cannot be altered except by way of an appeal or review. The Court can direct the general conduct of the administration of the estate under its inherent powers.

T. M. Krishnaswami Aiyar and *A. Sundaram Aiyar* for Petitioner.

G. R. Jagadisan, O. Radhakrishnan and *A. R. Ramanathan* for Respondent.

R.M. *Petition dismissed.*

Panchapakesa Ayyar, J. Athappa Gounder *v.*
7th October, 1955. Periaswami Gounder.
C.R.P. Nos. 718 and 719 of 1955.

Code of Civil Procedure (V of 1908), Order 23, rule 3—Recording compromise—When could be done—Inchoate negotiations and incomplete arrangements—If could be acted upon—Powers of an appellate Court to interfere—Orders if revisable under section 115, Civil Procedure Code.

A compromise, if it is to be recorded by Court and a decree passed in terms thereof, should fall under one of the three known categories, *viz.*, (*a*) where all the parties involved are knowingly and willingly parties to an oral adjustment or compromise, the terms of which they know and have accepted ; (*b*) where the lawyers appearing for the parties, exercising the powers given to them under their vakalats, adjust the matter and enter into a compromise whether the parties have agreed or not and (*c*) where the terms of the compromise have been embodied in a document presented to Court, signed by the parties and their advocates and the Court is asked by a separate petition to pass a decree in terms of the compromise with leave of Court in case of minors, etc., if any, to enter into such a compromise.

It is primarily the duty of the trial Court to be satisfied that the compromise is true and complete. Inchoate negotiations cannot be treated as adjustments

Govinda Menon and Ramaswami Gounder, JJ. Ananthayya *v.* Thimmaju.
13*th September*, 1955. S.A. No. 435 of 1951.

Transfer of Property Act (IV of 1882), *section* 60—*Last paragraph—Exception to the rule against partial redemption—Applicability.*

The rule enunciated in the last paragraph of section 60 of the Transfer of Property Act prohibits what may be called partial redemption of a mortgage on payment of a proportionate part of the mortgage amount. The mortgage security being one and indivisible, the mortgagee has got a right to insist upon a redemption of the entire mortgage. But there is an exception created to this rule in cases where the mortgagee acquires in whole or in part the share of a mortgagor. This exception itself is subject to certain limitations. This exception can come into play only where there is a person interested in a share only of the mortgaged property and seeking to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, and a mortgagor whose share the mortgagee had acquired. In other words, it contemplates more than one person owning a share in the mortgaged property, either jointly or in common, or, in separate portions. Therefore, if there is only one mortgagor owning the entirety of the mortgage security and if the mortgagee should acquire a part of the security, then, there can be no question of the said exception coming into play at all. In such a case, the purchase money may go in reduction of the mortgage amount, and the mortgagee will be entitled to enforce his mortgage against the remaining properties for the whole of the remaining amount due on his mortgage.

I.L.R. (1941) All. 220, referred.

The second classes of cases to which that exception would not apply is where the mortgagee acquires the share of a mortgagor in execution of a decree on a prior mortgage. The principle of that rule is that the purchase in execution of a prior mortgage decree releases the property from the burden of the subsequent mortgages, and so, free also from any claim for contribution by the mortgagee who purchases such property.

I.L.R. 32 All. 612 and I.L.R. 22 Pat. 637, referred.

The third class of cases which would not fall within the aforesaid exception is where a mortgagee voluntarily releases from the suit a portion of the mortgaged property and acquires the same subsequently. In such a case the mortgagee is not bound to recover the whole of the mortgage amount from any portion of the mortgaged property though a release of certain items by the mortgagee may not have the effect of releasing those items from liability for contribution under section 82 of the Transfer of Property Act.

It is open to a mortgagee to release a part of the mortgaged property without any obligation to abate a proportionate part of the mortgage amount and if subsequent to such release he purchases the property, then, such a case would not fall within the exception of the last paragraph of section 60. In such a case, he would not be purchasing the property *qua* mortgagee. By his release, the property goes out of the mortgage without any corresponding obligations on his part ; and if he purchases the property, then, he would be purchasing a property unconnected with the mortgage, so that, the purchase, if at all, may bring about only a reduction of the mortgage amount and would not affect his right to proceed against the other properties for the balance remaining due under the mortgage.

33 M.L.J. 211 : I.L.R. 40 Mad. 968 ; I.L.R. (1942) All. 708 (P.C.), followed.

(1940) 2 M.L.J. 1003, approved and distinguished.

(1941) 2 M.L.J. 520, distinguished.

T. Krishna Rao for Appellant.

B. Lakkappa Rai and *M. G. Kamath* for Respondent.

R.M. *Appeal allowed.*

M—N R C

Ramaswami, J. Susheela *v.* Gangadharan.
13th September, 1955. A.A.O. No. 345 of 1954.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) *(since repealed by Central Act XXV of* 1955), *section* 5 (1) *(c)—Desertion—Essentials to prove.*

In order to sustain an application for divorce on the ground of 'desertion' under section 5 (1) (*c*) of the Madras Act VI of 1949 (since repealed by Central Act XXV of 1955) five essential factors must be established, *viz.*,

(*a*) the spouses must have parted or terminated all joint life;
(*b*) the deserting spouse must have an intention to desert the other spouse;
(*c*) the deserted spouse must not have agreed to the separation;
(*d*) the desertion must have been without good cause; and
(*e*) the deserted state of affairs must have continued for at least three years (the period fixed by the Statute) immediately preceding the presentation of the petition. The existence of one or more of these factors is not sufficient to constitute desertion.

The principle of English law and Practice might still be followed in this country in cases of doubt or absence of specific statutory provision.

(What constitutes desertion, the nature of the offence under matrimonial law, types of desertion and how they are terminated—fully discussed with case-law.

G. Natarajan for Appellant.

N. K. Mohanarangam Pillai and N. K. *Pattabhiraman* for Respondent.

R.M. *Appeal dismissed.*

Govinda Menon and Ramaswami Gounder, JJ. Veerankutty *v.*
14th September, 1955. Pathumma Kutty.
S.A. No. 1099 of 1951.

Mohammedan Law—Gifts—Creation of a life estate with vested remainder—Validity—Law as to—If any difference between Shias and Sunnis—Principles of administration of Mohammedan Law.

The reservation of the usufruct of a property, being the subject of a gift, does not by itself, make the gift of that property void under the Mohammedan Law and that principle applies not only to Shias but also to Sunnis.

Muslim Law recognises and insists upon a distinction between the corpus of the property and its usufruct. Over the corpus of the property the law recognises only an absolute dominion, heritable and unrestricted in point of time. In any gift of a corpus with condition inconsistent with such absolute dominion, the condition is rejected. But the dominion over the corpus takes effect subject to any limited interest in the usufruct of the property. A gift of the corpus with reservation to collect the accruing income during the lifetime of the donor is valid and enforceable. The Courts have to administer the Muslim Law without in any way circumventing or deviating from the original text, the law as promulgated by the Islamic Law-givers, to suit the present day conditions. Courts are not at liberty to refuse to administer any portion of those tenets even though in certain respects they may not sound quite modern.

There is no difference between the several schools of Muslim Law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools.

(1954) 1 M.L.J. 673, referred.

11 M.I.A. 517 : 44 All. 301 (P.C.), followed.

It is no doubt true that in order to consitutte a valid gift under Mohammedan Law there must be delivery of possession of the subject-matter of the gift by the donor to the donee. But in cases where the property is in the occupation of tenants, it cannot be said that it is impossible for a Mussulman to make a gift of that property unless there is an attornment of the tenants to the donee or any receipt of the rents and profits by the donee.

(1950) 1 M.L.J. 209, doubted.

M. Chinnappa Nair and *A. P. Kuttisankara Menon* for Appellant.

T. K. Raman Nambisan for Respondents.

R.M. *Appeal allowed.*

Rajamannar, C.J., and Panchapakesa Aiyar, J. Srinivasa Pillai *v.*
30th September, 1955. Muthayya Pillai.
A.No. 117 of 1951.

Madras Agriculturists' Relief Act (IV of 1938), *section* 8 *(as amended)—Explanation III—Renewal of a debt—Scope of.*

The Explanation III to section 8 of the Madras Agriculturists' Relief Act, 1938, as it stands now, after the amendments of 1948 and 1950 emphasises the identity of the debt. So long as the identity can be traced, any change or alteration in the debtor or the creditor would not take the case away from the Explanation. The renewed document may be by a person other than the original debtor and in favour of a person other than the original creditor.

(1940) 2 M.L.J. 517 : I.L.R. (1941) Mad. 128 ; (1950) 1 M.L.J. 224, distinguished and explained as decided before the amendment.

The word ' assign ' in the explanation does not mean ' heir' ; it means a person substituted for another by an act of some kind or other. Though ordinarily we only speak of assignment of rights, in law there can be an assignment of liabilities as well. In every case where with the consent of the creditor another debtor is substituted for the original debtor, there is in effect an assignment of liability The new debtor would be an assign of the original debtor so long as the identity of the debt is maintained. The expression is wide enough to include a person executing a fresh document in pursuance of an undertaking to do so on behalf of the original debtor.

(Difficulty of construction of the words ' in his interest ' in the Explanation pointed out—History of Legislation traced).

J. R. Gundappa Rao for Appellants.

T. R. Srinivasan and *S. Gopalaratnam* for Respondent.

R.M. *Appeal allowed.*

Ramaswami, J. Subbammal *v.*
4th October, 1955. Sudalayandi Konar.
A.A.O. No. 505 of 1953.

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) *(since repealed by Central Act XXV of* 1949), *section* 5 (8)*—Permanent alimony for the divorced woman—When made—" Until her remarriage with another man "—Meaning of.*

Practice—Divorce—Grant of maintenance—Factors to be considered—Rule of dum sola et casta*—Applicability—Quantum of maintenance—Factors to decide.*

Under section 5 (8) of the Madras Hindu (Bigamy Prevention and Divorce) Act, a Court, when ordering the dissolution of a marriage under particular subclauses of that section, may make suitable provisions for the maintenance of the woman until her re-marriage with another man. It is true that a discretion is vested in the Court to grant permanent alimony or not. But the discretion has to be exercised on sound judicial principles. The words " suitable provision for the maintenance of the woman until her re-marriage with another man " connote only that provision has to be made for the life of the woman but terminable on her re-marriage. Re-marriage indicates only the termination of the grant of permanent alimony, which has to be granted for life unless that limiting contingency occurs. It is not correct therefore to say thet merely because a divorced woman is past the age of re-marriage and is not likely to get re-married, no provision need be made for her. The very principle of awarding permanent alimony to women on the dissolution of the marriage is that they should not be suddenly left without protection for their livelihood.

In estimating the amount of alimony the court should consider :

(1) the property of the wife, (2) the husband's ability to pay, (3) the conduct of the parties, (4) their position in life, (5) their ages and respective means, (6) amount of the provision already made, (7) existence of children and their entrustment, (8) any other circumstances worth considering.

In granting permanent alimony the Court has discretion to insert in the order what is known as *dum sola et casta* clause *i.e.*, so long as the woman remains chaste and unmarried. This clause is inserted because when the woman for whose protection the alimony is granted—because she was left without a protection—taken

unto herself another protector or is leading an adulterous life, the former husband is under no obligation to maintain such a wife.

(Analogous statutes and case-law—English and Indian—discussed.)

S. Ramachandra Aiyar for Appellant.

S. V. Rama Aiyangar for Respondent.

R.M. —————— *Appeal allowed.*

Somasundaram, J.
14th October, 1955.

Seetharaman, *In re.*
Crl. R.C. No. 269 of 1955.
Crl. R.P. No. 257 of 1955.

Code of Criminal Procedure (V of 1898), *sections* 110, 118 *and* 123 *and Constitution of India, Article* 22 (4)—*Demand of security to keep the peace and detention in default under Code of Criminal Procedure—If opposed to Article* 22 (4) *of the Constitution.*

It is true that the detention under section 123 of the Code of Criminal Procedure in default of furnishing security to keep the peace is in one sense a preventive detention. But the preventive detention in such a case is different from the preventive detention contemplated in Article 22 (4) of the Constitution. The provisions of section 123, Criminal Procedure Code, which provides for detention for failure to give security which is ordered after full trial, is not detention referred to in Article 22 (4) of the Constitution, and is not *ultra vires* of the Constitution.

A.I.R. (1953) All. 753, followed.

A.I.R. (1950) All. 562, referred.

The detention contemplated by Article 22 (4) and (5) of the Constitution is the detention by the executive authority and not by a judicial tribunal, after full trial.

S. Mohan Kumaramangalam for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. —————— *Petition dismissed.*

Govinda Menon and Basheer Ahmad Sayeed, JJ.
21st October, 1955.

Anganna Goundan *v.*
Angamuthu Goundan.
C.R.P. No. 2113 of 1952.

Code of Civil Procedure (V of 1908), *Order* 33, *rule* 5 (*d*) (*i*), *as amended in Madras—Application for leave to sue* in forma pauperis—*Court if can go into the question whether claim is barred by limitation—Scope and extent of—Right of respondent to adduce evidence even at that stage to show that the claim is barred by any Law of Limitation.*

Considering the scheme of Order 33 of the Code of Civil Procedure, the result of the sub-rule (*d*) (*i*) of rule 5 of the said Order, added by the Madras amendment, is that if a Court is satisfied that any suit sought to be filed *in forma pauperis* is barred by any law, it can reject the application for permission to sue as a pauper after examining the applicant only without hearing the other side.

The combined effect of rules 5, 6, and 7 of Order 33, Civil Procedure Code, is that if the Court is satisfied in the first instance that an application to sue *in forma pauperis* is in proper form and is duly presented it can, if it thinks fit, examine the applicant on the merits of his claim and his property. At this stage the opposite party has no *locus standi.*

If the Court sees no reason to reject the application on a *prima facie* perusal of it, then it has to give notice to the Government Pleader and the opposite party and fix a date for receiving such evidence as the applicant may adduce to prove that his application is not subject to any of the prohibitions mentioned in rule 5 and at this stage the opposite party is entitled to let in rebutting evidence to the contrary. If this stage is successfully tided over by the applicant, then his application should be registered as a suit. At this second stage there is no warrant for restricting evidence to be let in only in regard to allegations in the application. Rule 6 expressly allows the opposite party to adduce evidence. It is open to the respondent to let in evidence to show that the suit appears to be barred by any law.

(1948) 1 M.L.J. 400 : (1949) 1 M.L.J. 61, approved.

A.I.R. (1955) Andhra 165, differed.

P. S. Balakrishna Ayyar and *P. S. Ramachandran* for Petitioner.

T. R. Ramachandran, P. S. Kailasam and *A. Palaniswami* for Respondent.

R.M. —————— *Petition dismissed.*

Krishnaswami Nayudu, J.
23rd September, 1955.

Valliammal *v.* Angammal.
S.A. No. 1682 of 1951 and
S.A. No. 2067 of 1952.

Registration Act (*XV of* 1908), *sections* 32 *and* 47—*Person competent to present a document for registration—Validity of registration by strangers.*

In order to hold that a document has been legally and validly registered it is necessary to conform to the imperative provisions of section 32 of the Registration Act governing the presentation of documents for registration. Unless the person presenting a document could come within any of the categories of persons mentioned in section 32, the document, though registered on being presented by some other person, could not be held to be validly registered.

The effect of section 47 of the Registration Act is that notwithstanding the statutory requirement of registration to make a document valid, once it is executed it becomes operative from that date. That is, the transferee acquires a right in the property and becomes an assignee. The further requirement of registration is a matter which is not in the hands of the executant. The transfer becomes complete on execution of the deed and it cannot be considered incomplete because it is unregistered. Non-registration is not a thing of which the executant can take advantage.

Hence a person in whose favour a sale deed in respect of a certain property has been executed, can present a document for registration relating to that property as he is an assign of the executant and his right is not in any way affected merely because the sale deed in his favour is not registered.

A. Kuppuswami for Appellants.

K. S. Ramamurthi, *K. Vaitheswaran* and *Rajeeva Lochani*, for Respondents.

R.M. — *Appeals dismissed.*

Krishnaswami Nayadu, J.
7th October, 1955.

Mari Muthuswami *v.* Ramakutti Goundan.
S.A. No. 74 of 1952, *etc.*

Partnership Act (*IX of* 1932), *sections* 37, 46 *and* 47—*Dissolution of partnership —Right of surviving partners and the representatives of a deceased partner—Suit for account barred by limitation—Representatives of a deceased partner in possession of certain items of partnership property—If could retain them and dispose of the same—Right to the property—If barred because of the right to account is barred.*

It is no doubt true that when a partnership is dissolved by reason of the death of a partner the right of the representative of the deceased partner is to institute a suit for accounts and recovery of their respective shares in the property. Such a suit is to be instituted within three years of the dissolution as per Article 106 of the Limitation Act.

I.L.R. 57 Mad. 931 : L.R. 61 I.A. 257 : 67 M.L.J. 167 (P.C.), referred.

But in cases where the representative of a deceased partner is in possession of certain partnership properties and a suit for accounts is barred, it cannot be said that the possession of the properties by the said representative is illegal or unlawful merely on the score that their only right to sue for accounts being lost, they have no right to any property of the partnership.

A right to recover a deceased partner's share by partition as such has not been provided for as a remedy of the representative of the deceased partner under the Partnership Act. The only right recognised is a suit for accounts. But the right of the representative to the property of the deceased will subsist and cannot be denied. If persons who have a right to such property are in possession of the same and if a suit for account relating to such property is barred, there is nothing preventing the persons in possession, who are not strangers, from perfecting their title to such properties. The right to account being barred, the right to the partnership property becomes extinguished and if any property is in the hands of any of the surviving partners or the representatives of a deceased partner, such possession could not be disturbed and they acquire a valid and indefeasible title to the same.

(Reason of the rule explained.)

I.L.R. 45 Mad. 378 : L.R. 49 I.A. 181 : 43 M.L.J. 365 (P.C.) ; (1954) 2 M.L.J. 639 (F.B.), referred and followed.

M. Natesan for Appellants in all the Appeals.

D. Ramaswami Ayyangar and *P. R. Varadarajan* for Respondent in S.A. Nos. 63, 64 and 74 of 1952 and Appellants in S.A. Nos. 92 and 194 of 1952.

R. Ramamurthi Ayyar for Respondents in S.A. Nos. 92 and 194 of 1952.

R.M. —— *Appeals remanded.*

Rajagopala Ayyangar, J. Kuppuswami Ayyar *v.* Harinarayanachari.
13*th October*, 1955. C.R.P. No. 567 of 1955.

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (i)—*Wilful default—Scope.*

In considering a case seeking eviction of a tenant for default in payment of rent under section 7 (2) (*i*) of the Madras Buildings (Lease and Rent Control) Act, 1949 a distinction has to be drawn between mere failure to pay the rent and a wilful default in such payment. In the absence of evidence showing a deliberate intention to withhold payment, there cannot be a wilful default to constitute a ground for eviction.

A tenant's illness and the alacrity with which he paid the rent after receipt of notice, though not conclusive, is certainly relevant to negative wilful default.

K. V. Srinivasan for Petitioner.

N. S. Srinivasan for Respondents.

R.M. —— *Order accordingly.*

Krishnaswami Nayadu, J. Gopinath Shetty *v.* Santhamma.
14*th October*, 1955. S.A. No. 210 of 1952.

Hindu Law—Aliyasanthana System—Adoption—Object of—Right of adoptee in the natural family—Proof of custom.

The object of an adoption according to the Aliyasanthana school of Hindu Law is secular and not religious. But the religious motive is not totally excluded. The object being to perpetuate the tarwad, females are often taken in adoption. Though such adoption resembles the Kritrima form it does not mean that all the incidents of Kritrima adoption are attached to an adoption in an Aliyasanthana family. The law applicable to an adoption in an Aliyasanthana family is essentially customary. Whether an adopted person in an Aliyasanthana family loses his right of inheritance in the natural family can be decided only by evidence of custom.

Mayne 11th Edition, page 980, Sundara Iyer's Malabar Law (1922 Edition) pages 28-32, referred.

Being a customary form of adoption its incidents and legal effect on rights to property will have to be decided according to the custom prevailing in particular families governed by such systems of law. The normal rule in every case of adoption, whether sanctioned by law or by custom or usage, is that it effects a severance of the adoptee from the family of his birth. If there is any custom contrary to this rule it is for those who rely on such custom to establish it.

S. Ramayya Nayak for Appellant.

M. K. Nambiyar and *A. Narayana Pai* for Respondents.

R.M. —— *Appeal dismissed.*

Rajagopalan and Ramaswami Gounder, JJ. Duraiswamy Iyer *v.*
19*th October*, 1955. United India Life Assurance Co., Ltd.
C.C.C.A. No. 114 of 1955.

Insurance—Contract of—Right of policy-holder—Relationship between company and policy-holder—If one of trustee and beneficiary or debtor and creditor—Extent of the right of a policy-holder to the funds of the company—Purchase of house property—If includes construction of a house.

In the absence of a special contract, generally a third party has no right to rely on the articles of association of a company, which is only a contract between the company and its members (shareholders) in respect of their rights as members. Even a shareholder must be regarded as an outsider in so far as he contracts with the company otherwise than in respect of his shares. A contract of life assurance is a mere contract to pay a sum of money on the death of the assured in consideration

of the due payment of a certain annuity during his life. This in no way resembles a contract of indemnity. The policy-holder has no right or specific lien or immediate control over the funds of the insurance company. Even in cases where the contingency upon which payment depends has determined and the policy money has become due and payable and there is default in payment when due, the grantee cannot, by reason of such default, resort immediately to the property of the company, but must resort only to legal process, which might in its final result, when the process is executed, affect the property of the company. The grantee has ordinarily nothing but a right of action from the date of the contract until actual payment.

An insurance company cannot be deemed to be a trustee of the policy monies of its policy-holders even where the form of the policy creates a charge upon the funds of the company without any direct promise to pay. An insurance company is in the position of an ordinary debtor and must be treated accordingly. Hence, apart from the special terms of any particular trust deed it is not open to the policy-holders to take advantage of anything contained in the articles of association of a company, as giving them any beneficial interest or other claim to the funds of the company on the basis that the company is in the position of a trustee in relation to the fund.

It may be that the policy-holders have a right to intervene if the company dissipates or wastes or diverts the funds out of which they expect to be paid the amounts assured to them on the maturity of their policies. But in the absence of any proof of wastage or dissipation, the form of investment is a matter for the Directors to decide, subject to their powers in the matter of investment.

The word ' purchase ' in its wider context means the acquisition of property by every mode known to law, except that which comes by descent and operation of law. The word purchase must be given a wider meaning so as to include the construction of a new building.

Law Lexicon by P.R. Iyer (M.L.J.), referred.

67 M.L.J. 336, followed.

M. S. Varadachary, N.R. Raghavachari and *K. Venugopala Aiyangar* for Appellants.

T. M. Krishnaswami Ayyar, K. P. Adiga and *M. Subramania Mudaliar* for Respondents.

R.M. *Appeal dismissed.*

Krishnaswami Nayudu, J.
19th October, 1955.

Paramananda Mudaliar *v.* Palani Mudaliar.
S.A. No. 372 of 1952.

Deed—Rectification—Mutual mistake—Proof in a suit for declaration of right—Necessity for a separate suit for rectification.

Where a mistake in a written instrument is a real one and mutual, and could be established by satisfactory proof, a Court of equity would reform the written instrument so as to make it conformable to the precise intent of the parties and in such a case a party is entitled to relief upon a construction of the instrument itself without the necessity of having to take proceedings by way of a separate suit for rectification of the instrument. A Court is competent to give effect to the indisputable agreement between the parties without driving the plaintiff to a separate suit for rectification.

S. V. Venugopalachari for Appellant.

B. C. Panchanathan and *R. D. Indrasena* for 1st Respondent.

R.M. *Appeal dismissed—No leave.*

Ramaswami, J.
21st October, 1955.

Velu Mudaliar *v.* Rajaram.
A.A.A.O. No. 205 of 1952.

Madras Agriculturists Relief Act (*V of* 1938), *section* 9-A, *sub-section* (10) (ii) (b) *—Mortgagee transferring wholly or in part the mortgagee's right in the property—What amounts to.*

The words 'transferred wholly or in part the mortgagagee's right' in section 9-A (10) (*ii*) (*b*) of the Madras Act IV of 1938 means only the normal case of an outright or absolute transfer of either the whole or part of the hypotheca. The transfer, in order to get the exemption, should be of the hypotheca and not any other limited right in the same. Creation of an encumbrance, which may amount to a limited form of transfer, or the creation of a sub-mortgage by the mortgagee would not amount to 'transfer' within the meaning of the sub-section and will not attract the benefit of the exemption.

K. Hariharan for Appellant.

S. V. Rama Aiyangar for Respondent.

R.M. *Orders accordingly.*

Somasundaram, J.
27th October, 1955.

Aiyanna Chetti *v.*
Pala Mudduk Vinnayya & Co.
C.R.P. No. 899 of 1953.

Madras Buildings (*Lease and Rent Control*) *Act* (*XXV of* 1949), *section* 7 (2) (ii) (a)—*Sub-letting without written consent of landlord—Scope of.*

Under the ordinary law a tenant or lessee has a right to sub-lease the lease-hold property. But this right has been taken away by the Madras Buildings (Lease and Rent Control) Act, 1949. In the absence of a specific provision in the lease deed the right of a tenant to sub-let under the ordinary law cannot therefore be enforced now.

The Act curtails and modifies the ordinary law and has to be construed strictly. Merely because the Act is intended to benefit the tenants, there is no reason that every section must be construed in favour of the tenant and against the landlord. Merely because a landlord had knowledge of the sub-letting by the tenant he cannot be deemed to have given any implied permission. Nor could it be said that he is estopped from availing himself of the prvisions of this Act.

Merely because in a lease deed the clause relating to prohibition against sub-letting which was sought to be introduced by the landlord was later dropped at the request or desire of the tenant, it cannot be inferred that the landlord had waived his right under the Act. Nor could there arise any question of equity in interpreting or applying the provisions of a special Act like the Madras Act XXV of 1949.

In the absence of a written permission of the landlord sub-letting by the tenant after the specified date will be a ground for eviction under the Act.

C. A. Vaidialingam and *P. Venkataramani* for Petitioner.

K. S. Narayana Ayyar and *N. Sivaswami* for Respondent.

R.M. *Petition allowed.*

[End of Volume (1955) 2 M.L.J. (N. R. C.).]